Supreme Court, U.S.
FILED
01 353 AUG 27 2001
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

Linz Audain

Petitioner,

v.

The American University, And
American University,
Washington College Of Law,

Respondent.

Petition For A Writ of Certiorari
to the United States Court of Appeals
For The District of Columbia

Petition For A Writ of Certiorari

H. Vincent McKnight, Jr., Esq.
Counsel of Record
Law Offices of Ashcraft & Gerel
2000 L Street, N.W., Suite 400
Washington, D.C. 20036
(202) 783-6400

August 27, 2001

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81 pp

QUESTIONS PRESENTED

1. After *Reeves v. Sanderson Plumbing, Inc.*, can a federal court maintain a racial discrimination standard that requires that plaintiff show evidence of actual discrimination and a summary judgment standard in which the court looks at the facts in the light most favorable to the summary judgment movant?

2. After *Reeves v. Sanderson Plumbing, Inc.*, where plaintiff claims that he was treated disparately with respect to sexual harassment allegations lodged against him, can a federal court prohibit plaintiff from the discovery of sexual harassment allegations made against others while simultaneously holding that plaintiff failed to produce sufficient evidence supporting his claim of racial discrimination?

3. After *Reeves v. Sanderson Plumbing, Inc.*, in ruling on a motion for summary judgment on contract claims, can a federal court fail to look at the entire record, ignoring those contract claims that presage liability for the summary judgment movant?

4. After *Reeves v. Sanderson Plumbing, Inc.*, in ruling on a motion for summary judgment with respect to a plaintiff's claims of discrimination in connection with his matriculation at a college or university (as provided by the District of Columbia Human Rights Statute) can a federal court ignore the evidence altogether relying instead on the unsubstantiated beliefs of the summary judgment movant?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the petitioner Dr. Linz Audain and respondents, The American University and The American University, Washington College of Law.

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IN THE SUPREME COURT OF THE UNITED STATES

LINZ AUDAIN,

Petitioner,

v.

THE AMERICAN UNIVERSITY,
AND WASHINGTON COLLEGE OF LAW,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OPINIONS BELOW

The opinions of the Court of Appeals for the D. C. Circuit have not been reported. They appear in the Appendix hereto ("C. App.") at 1a, 10a, 12a. In particular, the Court of Appeals' opinion summarily upholding the district court's denial of Dr. Audain's motion for reconsideration appears at C. App. 1a. The memorandum decision of the United States District Court for the District of Columbia (Hogan, D.J.) dismissing Dr. Audain's contract claims is the only decision in this case that has been reported (1998 U.S. Dist. LEXIS 16679). Judge Hogan's memorandum decisions: a) denying Dr. Audain's motion for reconsideration and b)dismissing on summary judgment Dr. Audain's contract claims, as well as his racial and matriculation discrimination claims appear at C. App. 3a, 14a, and 20a respectively. His decision upholding Dr. Audain's motion for summary judgment regarding the University's defamation counterclaim but denying it regarding the University's breach of contract counterclaim appears at C. App. 37a. His decision denying Dr. Audain's right to conduct

discovery regarding sexual harassment allegations lodged against similarly situated individuals at the University is reprinted at C. App. 42a.

JURISDICTION

This suit was brought by Dr. Audain before the Superior Court of the District of Columbia on November 10, 1994. On December 13, 1994, the University removed this case to the District Court invoking the doctrine of federal question jurisdiction in view of Dr. Audain's claim under 42 U.S.C. Sec. 1981. On June 25, 1998 and October 8, 1998, the District Court granted summary judgment to the University regarding Dr. Audain's racial/matriculation discrimination and contract claims respectively. Dr. Audain filed an interlocutory appeal with the Circuit Court of the D.C. Circuit on January 13, 2000. It affirmed the District Court on March 14, 2000. This Court decided *Reeves v. Sanderson Plumbing Inc.*, on June 12, 2000. The University's contract counterclaim was pending before the District Court and a motion for reconsideration was filed before it based on *Reeves*. It was denied November 16, 2000. Thereafter, the University voluntarily withdrew its counterclaim and the District Court entered final judgment in this case. That judgment was appealed and summarily affirmed by the Circuit Court on June 18, 2001.

The jurisdiction of this Court to review the judgment of the Circuit Court for the D.C. Circuit is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

42 U.S.C. Sec 1981. Equal rights under the law. C. App. 47a.
D.C. Code Secs 1-2501 et seq Racial/Matriculation Discrim. C. App. 48a.

STATEMENT OF THE CASE

Petitioner, Dr. Linz Audain, a native of Haiti, is a presently 42 year old African-American man who graduated from college at the age of 18. He holds six graduate degrees: B.A. (Southern Adventist University, 1979), M.B.A./M.A. (University of Miami, 1981), M.S.M. (Florida International University, 1982), J.D. (University of Chicago, 1987), Ph.D. (Duke University, Economics, 1991) and M.D. (Howard University, 1997). He has a personal history of other notable intellectual achievements (e.g., scoring in the 99.9th percentile on his Medical College Admission Test). Also in the past he has engaged in greater than full-time employment while simultaneously pursuing multiple graduate degrees.[1] Joint Appendix ("App"), 344-348, 350, 382, 428.

In 1989 Dr. Audain was hired by the Washington College of Law of The American University ("WCL") as an Assistant Professor of law, where he performed "with some distinction" C. App. at 26a. He was promoted to Associate Professor of Law in the spring of 1992. From the start of his career at the WCL Dr. Audain's Rank and Tenure Subcommittees ("Subcommittee") evaluating him found him to have "excellent teaching ability", making "serious contribution to the literature in the field of law and economics" and "important contributions to the law school and University communities." App. at 933, 934.

In April of 1993, a then 31 year old white female student at the WCL, not his own student, who had been "encouraged"

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1 For example, Dr. Audain held his first teaching job at the University of Miami at the age of 21. At the same time he held two additional jobs and was working "in excess of 40 hours per week." App. at 347-349. During this time, he also simultaneously pursued two graduate degrees. App. at 348. To wit, during one semester he completed 36 credit hours the majority of which were graduate business credits earning an equal number of "A's" and "B's". App. at 238.

by some of Dr. Audain's colleagues at the WCL to submit her allegations, alleged that Dr. Audain had sexually harassed her. App. at 422, 800, 934, 935. The document containing her allegations recites on its face that it is a "report", a "summar[y] of a conversation" and "not a finding of fact." App. At 1288, 1299. Dr. Audain vehemently denied the charges. He produced affidavits from three female students consistent with his denials. The University has never produced student affidavits, not even from the student making the allegations.[2] Notwithstanding this, the student's allegations went through the University's process pursuant to the Sexual Harassment Advisory Committee Manual. A "letter of understanding" was delivered to the student, and the matter was declared "closed" by University officials in the summer of 1993. Although the Sexual Harassment Manual provides for the bringing of a formal complaint and a formal process, no such complaint was ever brought against Dr. Audain and no formal process was ever commenced. App. at 934, 935, 1084.

In the fall of 1993, after being informed by University officials that he could not have information from the University regarding the student's allegations because the matter was confidential, Professor Herman Schwartz, then chair of Dr. Audain's Subcommittee, solicited and received information directly from the student regarding her allegations. App. at 935. Months earlier, Professor Schwartz had used the phrase "uppity nigger" in one of his classroom lectures. An African-American student in his class at the time asked, but Professor Schwartz refused to apologize to him about his comment. The student complained to the WCL administration about Professor

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2 One female student averred that the idea that Dr. Audain would have sexually harassed a female student was "farthest from the truth." App. at 164. An alumna of the WCL, an "attorney focusing on the practice of employment discrimination law" averred that she was "appalled at the behavior of WCL" and that "WCL [had] fabricated the sexual harassment allegation against Audain ... to deny him tenure and oust him from WCL." App. at 161.

Schwartz's comment and subsequently left the law school. App at 428, 429, 370, 371, 914. In the spring of 1994, after compelling Dr. Audain to answer to the female student's allegations, Professor Schwartz filed a report with the full Committee on Rank and Tenure ("full Committee"). That report concluded that Dr. Audain met the three criteria for reappointment to his position as an Associate Professor stipulated by the Faculty Manual which provides the terms of faculty contracts. (i.e., adequate teaching, scholarship and service to the institution). App. at 509, 516, 523.

The report found however that Dr. Audain had "fallen short" of what was expected of a faculty member in two respects. First, it cited Dr. Audain's fall 1993 matriculation as a full-time student at the Howard University College of Medicine. App. at 523. Regarding the possibility of being both a full-time law professor and full-time medical student, Professor Schwartz had observed to Dr. Audain that "you might be some kind of genius but I've never heard of such a thing." App. at 429. Dr. Audain has testified that he did not physically attend most of his classes at Howard and that he pursued his medical school studies on his own time. App. at 144. He did not notify the law school that he was a student at Howard because his contract did not require that he do so. App. at 1123-1124, 381, 382, 431. The dean of WCL, Claudio Grossman and all faculty have testified that there was no evidence that Dr. Audain spent less time at the WCL after his medical school enrollment than before such enrollment. App. at 393-394, 1133, 1186-87. This testimony is supported by Dr. Audain's testimony and the statements of over 100 law students.[3]

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3 The record shows that Dr. Audain was at the WCL well over 40 hours a week. App. at 144, 507. A petition signed by over 100 law students during the time that Dr. Audain was enrolled in medical school states that he was a "readily accessible" professor at the law school. App. at 152. Dr. Audain testified with regard to the law school that he was there "virtually all the time," "literally seven days a week." App. at 372, 373. At his deposition, Dr. Audain asked the University's counsel to establish a connection between

Secondly, the Subcommittee Report found that Dr. Audain had exercised "bad judgment" by "attending a student party" and "dancing with a female student" namely, the one who had alleged that he sexual harassed her. App. at 522. Indeed, 8 of the 22 pages of the Subcommittee's Report were devoted to a discussion of Dr. Audain's allegedly bad judgment. Professor Schwartz subsequently testified that he objected to Dr. Audain's alleged seeking of a sexual relationship with a student. App. at 936, 1131, 1132. Yet, Professor Mark Hager, a white law professor, had actually had an 11 month relationship with a female student. This was known by members of the full Committee. These facts are sworn to by the student in her affidavit. App. at 1139. In fact, there were allegations of sexual issues between Professor Hager and more than one female student. App. at 939, 940. In discussions by the full Committee regarding Dr. Audain's reappointment, Professor Janet Spragens who had served as the WCL's sexual harassment officer, noted that the Committee was subjecting a minority faculty member to a "different standard." App. at 799. Indeed, Professor Hager was never disciplined. He was promoted and tenured. App. at 1184, 1185.

On February 16, 1994, the full Committee voted 13 to 10 with three abstentions that Dr. Audain was to resign from the law school or be denied reappointment as a tenure track law professor. App. at 790, 791, 811. The minutes of the Committee meetings make it clear that the votes of faculty members were influenced by discussions of the allegations of sexual harassment brought against Dr. Audain. App at 1137, 1138. Professor Schwartz voted against Dr. Audain. App. at 787, 808, 1138. Additionally, two other professors who voted against Dr. Audain, Professors Wilson and Hager, *Id.*, were known to harbor a belief about the "natural sexual promiscuity of the black male." App. at 433.

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his medical school enrollment and the alleged inadequacy of his scholarship. Counsel failed to do so. App. at 380.

Dr. Audain refused to resign. He asked Dean Grossman to make his decision and submit his recommendation to the University Provost. After meeting with counsel, Dean Grossman refused to submit his recommendation to the Provost. App. at 435, 815, 817. Instead, he compelled Dr. Audain to participate in a "meeting" with him. There, Dean Grossman asked Dr. Audain what he wanted to resolve this matter. Dr. Audain asked that he be granted tenure. Dean Grossman asked Dr. Audain to submit his *American University Law Review* article ("AU article") to him for external review so that he might consider Dr. Audain for tenure. Dr. Audain submitted this article. App. at 435. At the same time, Dean Grossman had in his possession the same manuscript on the "Paradox of Blackness" that the Schwartz Subcommittee had found to be adequate for meeting the scholarship standard for purposes of reappointment. App. at 363, 364. Dean Grossman himself never attended any of Dr. Audain's classes to evaluate his teaching. App. at 407. Dean Grossman submitted Dr. Audain's AU article for external review, which is the scholarship standard for tenure but not for reappointment. App. at 942. Four external reviewers reviewed Dr. Audain's AU article. Only one of the four was negative. App. at 942, 943.

Three months after this meeting with Dr. Audain, Dean Grossman issued a report to the Provost which recommended that Dr. Audain be denied *reappointment* because he a) met none of the criteria for reappointment (teaching, scholarship, service to the institution), b) he was enrolled as a full-time medical student (Dean Grossman has invoked the involvement of the ABA here)[4]. The report stated that it did not reach the

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4 After the Committee on Rank and Tenure had fired Dr. Audain, Dean Grossman stated for the first time that he had contacted ABA officials and allegedly had been informed that Dr. Audain could not be counted as a full-time law professor for student/faculty ratio purposes because of his matriculation in medical school. App. at 435, 436. There is no evidence in the record that Dean Grossman made ABA officials aware of the District of

issue of "poor judgment." App. at 502. The report contained omissions and factual inaccuracies.[5]

After Dean Grossman submitted his report to the Provost of the University, Dr. Ann Ferren, Dr. Audain petitioned her pursuant to the Faculty Manual, to access the University's internal grievance procedure. The Provost refused to allow him to do so. App. at 434, 918. Pursuant to the Faculty Manual, Dr. Audain petitioned the full Committee on Rank and Tenure for a rehearing in view of Dean Grossman's report to the Provost. The Chair of Rank and Tenure did not issue a ruling on his right to do so. App. at 434. In August of 1994, Dr. Audain was issued a terminal contract for the 1994-1995 academic year. App. at 1322.

From the fall of 1993 to the spring of 1995 (a time during which he was enrolled in medical school), Dr. Audain garnered a number of awards not previously received:

Columbia statute that prohibits discrimination on the basis of matriculation. Although the WCL's accreditation was on probation with the ABA, Dean Grossman has testified that "the student/faculty ratio is not the problem with accreditation." App. at 409. Indeed, the WCL continued to be on probation even after Dr. Audain had left the WCL. *Id.* Significantly, as the chair of the appointments committee when Dr. Audain was hired in 1989, Dean Grossman did not contact the ABA at that time despite Dr. Audain's status as a full-time doctoral student at Duke University. App. at 413.

5 The report made no reference to considering Dr. Audain for tenure. Dean Grossman's report did not discuss that the Schwartz Subcommittee had found the "Paradox of Blackness" manuscript to be sufficient for reappointment purposes. Subsequent to this "meeting" with Dr. Audain, the meeting has been characterized by Dean Grossman as an "independent review." App. at 435, 499. The faculty manual does not provide for such an "independent review " and one has never been conducted by a dean in the history of the WCL. App. at 446, 1192. Indeed, Dean Grossman himself had sat on and participated in discussions in Dr. Audain's Committee on Rank and Tenure. App. at 788, 796. The contemporaneous notes of the Committee meetings do not indicate that he was concerned with Dr. Audain's teaching, scholarship or service to the institution at that time. *Id.* During the course of this dispute, it is believed that Dean Grossman once referred to Dr. Audain as a "stupid Haitian." App. at 430.

"Outstanding Minority Scholar" (Indiana University); Lead Article (Indiana University Law Review); "Professor of the Year" (highest teaching award, WCL, spring 1995); coach, award-winning moot court team (Frederick Douglass Moot Court Competition, WCL, spring 1995). App. at 147, 363, 364, 818, 1229. At the time that he was denied reappointment, Dr. Audain had more total publications than some tenured full professors and had drafts of 16 manuscripts in process. App at 355-357, 377-379, 406. In June of 1995, during the term of his terminal contract, the WCL administration had Dr. Audain physically evicted from his office at the law school. App. at 378, 434. For two consecutive years after his denial of reappointment, Dr. Audain was unsuccessful in finding employment as a law professor. App. at 378, 434.

In November of 1994 Dr. Audain filed a complaint alleging a) race discrimination under Title VII and the District of Columbia Human Rights Act ("DCHRA"), b) Discrimination on the Basis of Matriculation at a College or University under the DCHRA, and c) Breach of Contract, seeking punitive damages against the University. App. at 22. During discovery, he was prohibited from discovering other allegations of sexual harassment at the WCL, and he was unable to discover the evidence of destroyed E-mail evidence that had occurred at the WCL[6]. Summary judgment was ultimately granted to the

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6 The University admitted to the existence of allegations of sexual harassment against other WCL faculty from "less than five students" at the WCL. App. at 273. Yet, by order of Judge Hogan, Dr. Audain was prohibited from discovering those allegations because they were allegedly not in writing. C App at 43a. Not even the ostensibly non-written nature of the allegations could be discovered. App. at 1510. Also, E-mail evidence at the University has been destroyed in this case. App. at 414-415. The University claims that it has not been able to determine who destroyed this evidence. App. at 1469. The WCL's then computer system administrator, Mr. Steve Ray, was not asked to investigate this destroyed E-mail. App. at 415. There is no evidence in the record that the District of Columbia Police Department was ever contacted by the University to investigate this destruction of property. The University

University with respect to all of Dr. Audain's claims. C. App. at 14a, 20a. The procedural posture of the case has been discussed above ("Jurisdiction").

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resisted an investigation by Dr. Audain's computer expert. App. at 1468. The University opposed but on August 31, 1995, Judge Hogan granted Dr. Audain's motion allowing inspection of the University's E-mail system. App. at 1408. A motion to compel, which the University opposed was granted in May of 1998. App. at 18. This order was rendered moot when Judge Hogan dismissed Dr. Audain's complaint. C. App. at 14a.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS SHOULD BE REVERSED BECAUSE THE DISTRICT COURT APPLIED RACIAL DISCRIMINATION AND SUMMARY JUDGMENT STANDARDS SPECIFICALLY OVERRULED BY THIS COURT IN *Reeves*, IT FAILED TO RECONSIDER AND RESCIND ITS RULINGS IN LIGHT OF *Reeves* AND IT WAS SUMMARILY AFFIRMED BY THE CIRCUIT COURT OF APPEALS IN THIS REGARD.

Rule 10(c) of the Rules of this Court provides in pertinent part that a Writ of Certiorari will be granted where a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." There are at least two reasons under this Rule why this Writ should be granted and the lower courts reversed in connection with petitioner's racial discrimination claim.

First, the District Court applied a racial discrimination standard that was specifically overruled by this Court in *Reeves*. In *Reeves v Sanderson Plumbing, Inc.*, 530 U.S. 133 (2000), a 57 year old man sued his employer for age discrimination and was awarded a jury verdict. The Fifth Circuit reversed the verdict under Rule 50 of the Federal Rules of Civil Procedure holding that the plaintiff had adduced insufficient evidence of actual discrimination. This Court unanimously reversed this standard that required that plaintiff adduce evidence of actual discrimination. The Court held that "plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at

147. Moreover, the Court made clear in *Reeves* that a showing that defendant's explanations are pretextual involves adducing evidence that "challeng[es] [defendant's] explanation for its decision" *Id.*, at 146, allowing a fact-finder to "reject the employer's explanation" *Id.*, at 149, as being false.

This Court also reaffirmed that the standard of review of Rule 50 is "analogous" to the standard of review of Rule 56. *Id.* at 150. In particular, on summary judgment, a "court should review all of the evidence in the record... it must draw all reasonable inferences in favor of the nonmoving party and it may not make credibility determinations or weigh the evidence [citations omitted]" *Id.* The Court reversed the Fifth Circuit because it had "disregarded evidence favorable to Reeves... and failed to draw all reasonable inferences in his favor." *Id.*, at 136.

Applying the preceding principles to the case at bar, it is undisputed that the standard that the District Court announced and applied is a standard that required that Dr. Audain "show[ ] that the employer's stated reason is false and that the *real reason for the adverse employment decision was, in fact, discrimination.*" (C. App. at 25a, italics supplied). That the District Court actually applied a standard requiring proof of actual discrimination to the case at bar, is remarkably clear.[7]

Yet this standard, one that required that Dr. Audain adduce evidence of actual discrimination in order to survive summary judgment, is precisely the standard that this Court overruled in *Reeves*. When asked to reconsider this standard and its summary judgment ruling against Dr. Audain in view of *Reeves*, the District Court conclusorily announced that "Nothing in Reeves contravenes the standards that have been applied in this case." (C. App. at 6a). It is this opinion that the Circuit

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7 "The Court finds that Mr. Audain has presented no credible evidence that the composition of his external review panel was influenced by racial discrimination." (C. App. at 29a). "Because there is no evidence that the review process was tainted by race discrimination, the Court will not intrude into this purely academic decision." (*Id.*, 30a]).

Court summarily affirmed (C. App. at 1a). Absent a reversal by this Court, the District Court's standard for racial discrimination cases will continue to be a valid precedent in the D.C. Circuit fully one year after this Court overruled such a standard in *Reeves*.

True, in its *dictum* the District Court conclusorily stated that the exception to *Reeves* had been met because Dr. Audain had not adduced sufficient evidence to show that the reasons offered by the University for his termination were pretextual.[8]

However, even in its in its *dictum*, the District Court's opinion violates *Reeves*. First, (see Reason II for granting this Writ), assuming *arguendo* that Dr. Audain did not adduce evidence of pretext, this is because he was denied the opportunity to do so in violation of the mandate of *Reeves* that he be given the opportunity to discover evidence of pretext. Second, because the record here shows much pretext, a finding to the contrary is a finding that violates the summary judgment standard of *Reeves* (e.g., the court must look at the entire record). Third, the District Court found that Dr. Audain made out a prima facie case of discrimination (i.e., he *was* qualified to hold the position of Associate Professor at WCL). Under *Reeves* (evidence establishing the prima facie case is relevant to the showing of pretext, *Reeves*, at 143), it follows that an issue of material fact for the jury was created automatically (see e.g., *Blow v. City of San Antonio*, 296 F.3d 293, 297 (5th Cir. 2001) when the University terminated him alleging that he *was not* qualified to be a professor because he could not teach, write, and

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8 "This Court's previous rulings-affirmed on appeal- make clear that even though the Court found that the plaintiff has made a prima facie showing, the defendant here has produced evidence of reasoned doubt, through four legitimate explanations, about the merits of the plaintiff's reappointment to a tenure-track position. The record does not contain sufficient evidence to demonstrate the falsity of the defendant's explanations, from which a reasonable jury could infer discrimination in this case under Reeves." (C. App. at 7a).

had produced insufficient service for the University. As such, under *Reeves* summary judgment was inappropriate.

Finally, *Reeves* and its progeny in the circuit courts indicate that the evidence of the University's pretext in this case is insurmountable. In *Reeves* this Court reaffirmed *McDonnell Douglas* which held that pretext will be shown when plaintiff shows "[T]hat other 'employees involved in acts against [the employer] of *comparable seriousness*...were nevertheless retained... '" *McDonald et al v. Santa Fe Trail Transportation Co et al* 427 U.S. 273, 283, n. 11 (1976) (quoting *McDonnell*, all notations in original). Here, the quantum of bad acts used by the University acting through its agent Professor Schwartz, was Dr. Audain's alleged seeking of a sexual relationship with a student. It follows that Professor Hager's actually having such a relationship is further along or a worse action along this continuum. However, not only was Professor Hager retained despite engaging in a worse action against his employer, he was actually promoted and tenured. Accordingly, it conflicts with this Court's holding to argue that pretext has not been shown here.

Also, in *Reeves*, the employer stated that Reeves was terminated because he had failed to keep accurate attendance records of the employees he supervised. This Court held: Reeves showed pretext by introducing evidence that he *had* kept accurate attendance records of the employees he supervised. *Reeves*, at 136. Similarly, here, the reasons offered by Dean Grossman (insufficient teaching, scholarship, and service to the University) have been controverted by Dr. Audain (sufficient teaching, scholarship and service to the institution), an earlier assessment made by the very committee that Dean Grossman himself sat on: the Committee on Rank and Tenure. The Dean was not concerned about Dr. Audain's teaching, scholarship and service while he sat on the Committee. App. at 788, 796.

Additionally, in *Reeves*, this Court focused on comments reflecting "age-based animus" made by those terminating Reeves, outside of the context of termination. *Reeves*, at 151. Similarly, here, the race-based animus of the "uppity nigger"

comment of Professor Schwartz, the chair of Dr. Audain's Rank and Tenure Subcommittee, is undisputed. And certainly, the progeny of *Reeves* in the circuit courts demonstrates the pretext in this case (see e.g., *Chuang v. University of California Davis* 223 F.3d 1115 (9th Cir. 2000, physical eviction of professor and racist remarks by university officials demonstrate pretext).[9]

The second reason why the courts below should be reversed is because the summary judgment standard applied by the District Court in this case was even worse that the standard overruled by this Court in *Reeves*. In *Reeves*, this Court overruled the Fifth Circuit because it had weighed the evidence, usurped the role of the jury and not looked at the evidence in the light most favorable to the nonmovant. Here, it would have been violative enough of *Reeves* had the District Court weighed the facts and looked at them in the light most favorable to the University. But the court did more than that. *Confronted with two sets of conflicting facts offered by the same source, the University, without explanation, the District Court elected to believe the set of facts that absolve the University of liability.* Summary judgment was then granted to the University based on those facts.

That is, as between Dean Grossman's reasons and the full Committee's reasons, the court offers no explanation as to why it chose to believe that Dean Grossman's reasons *and not* the Committee's reasons were the "real" reasons why Dr. Audain was fired. Clearly such an approach to summary judgment in which courts ignore incriminating evidence submitted by a party only to accept post-hoc exculpatory evidence submitted by the same party, is an approach that is far

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9 See also *Gordon v. United Airlines*, 2001 U.S.App. LEXIS 5048 (7th Cir., inconsistency in definition and application of termination standard, failure of employer to speak in one voice demonstrates pretext); *EEOC v. Town & Country Toyota, Inc.*, 2001 U.S.App. LEXIS 6435 (4th Cir. 2001, contradiction between nondiscriminatory and earlier reasons demonstrates pretext).

in excess of the judicial weighing of the evidence that this Court rejected in *Reeves*. The district court's standard is a standard of judicial advocacy that is certainly in conflict with the Rule 56 standard of *Reeves*. It should be reversed.

A third reason why the Circuit Court of Appeals should be reversed in this case is because the court failed to consider an intervening case issued by this Court.[10]

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10 This Court has announced that it will "Grant, Vacate and Remand" (GVR) cases decided by summary affirmance that fail to consider an intervening case that it has handed down. *Lawrence v. Chater*, 516 U.S. 163, 169 (1996). It is undisputed that the Circuit Court summarily affirmed the District Court's opinion denying Dr. Audain's motion for reconsideration and failed to consider for itself the applicability of the case of *Reeves*. However, reversal and not GVR is appropriate here because as discussed above, this case easily meets this Court's standard for a case that should be summarily reversed. Also, GVR would only prolong this now seven year old case. Summary reversal is what is indicated at this time.

II. THE LOWER COURTS SHOULD BE REVERSED BECAUSE IN VIOLATION OF *Reeves* AND OTHER RULINGS OF THIS COURT, THEY PROHIBITED DR. AUDAIN FROM THE DISCOVERY OF SEXUAL HARASSMENT ALLEGATIONS MADE AGAINST OTHERS WHILE SIMULTANEOUSLY HOLDING THAT DR. AUDAIN FAILED TO PRODUCE EVIDENCE SUPPORTING HIS CLAIM OF RACIAL DISCRIMINATION.

There are at least five reasons why the lower courts should be reversed on this issue. First, *Reeves* states that the plaintiff must be given the "opportunity to prove" that the reasons offered by defendant are pretexts for discrimination. *Reeves*, at 147. The different manner in which the allegations against Dr. Audain were handled, already alluded to by the law school's own sexual harassment officer, Professor Spragens, provides the perfect motivation for and therefore the best evidence that Dean Grossman's reasons are pretextual. Under the facts of this case, the showing of this disparate treatment is precisely equivalent to the showing that the alternative reasons offered are pretextual. In direct contravention of the holding of *Reeves* Dr. Audain was prohibited from showing disparate treatment and therefore pretext. Having forbad Dr. Audain the opportunity to discover evidence to show pretext as *Reeves* demands, in a remarkable twist of logic, the District Court held that Dr. Audain failed to meed the standard of *Reeves* because he failed to adduce sufficient evidence to show that the University's reasons were pretextual. It is this opinion that the Circuit Court summarily affirmed. It conflicts with *Reeves* and should be reversed.

Second, the District Court's discovery prohibition conflicts with this Court's ruling that discrimination cases

should feature "liberal discovery rules [that] give plaintiffs broad access to the employers' records in an effort to document their claims." *Wards Cove Packing v. Antonio* 490 U.S. 642, 657 (1989).[11] A third reason why the lower courts should be reversed on this issue is because this Court has already decided a similar issue in the case of *University of Pennsylvania v. EEOC* and similar policy considerations apply.[12]

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11 See also *Price Waterhouse v. Hopkins,* 490 U.S. 228, 292 (1989) (Kennedy, J., dissenting) ("Liberal discovery available to all litigants..."); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 258 ("Liberal discovery rules applicable to any civil suit..."); *Roadway Express, Inc. V. Piper et al,* 447 U.S. 752, 757 n. 4 (1980) ("Liberal rules of pretrial discovery"). Of course, the district court's discovery ruling was not at all liberal because if the court was correct in its assertion that Dr. Audain had not produced evidence of pretext then it must be true that the restriction that was placed on his ability to produce evidence of pretext- was too restrictive, that is, not liberal enough. Neither can it be argued that there is no quality of evidence that could have been discovered that would have sufficed to show pretext here. This is because such an argument presumes to know what the evidence would have shown. And surely the University cannot be trusted to say what the evidence will and will not show ("'Clearly an alleged perpetrator of discrimination cannot pick and choose the evidence which may be necessary for an agency investigation.'") *University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990) (quoting *EEOC v. Franklin and Marshall College*, 775 F.2d, at 116).

12 In *University of Pennsylvania v. EEOC* 493 U. S. 182 (1990), petitioner argued that it did not have to release the tenure files of male faculty members in a Title VII action brought by a female faculty member because of confidentiality concerns. This Court held: "A university does not enjoy a special privilege requiring a judicial finding of particularized necessity of access, beyond a showing of mere relevance, before peer review materials pertinent to charges of discrimination in tenure decisions are disclosed to the EEOC." *Id.*, at 182. The Court's rationale was that "The House Report [on Title VII] focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher (i.e., tenured) academic positions. [citations omitted]," *Id.*, at 190. "If there is a 'smoking gun' to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files." *Id.*, at 193. The "smoking gun" of race discrimination at the WCL is certainly to be found in

Fourth, reversal is warranted because of prior reversal by this Court under similar circumstances and by the doctrine of spoliation of evidence[13]

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the yet to be discovered facts as to how other allegations of sexual harassment were handled. The argument by the University that Dr. Audain should be denied discovery because "the only written complaint" at the WCL was the one lodged against him is factually wrong (the University' sexual harassment process provides for a written complaint, it is undisputed that one was not filed here). It is also irrelevant and without merit (the University's discriminating faculty members encouraged the student to put her allegations in writing, it is circular for them to now argue that there should not be liability for the University because her allegations were in writing). The University's concern about the privacy of its faculty members is disingenuous (e.g. the University although admitting to its confidentiality, released the written allegations of sexual harassment against Dr. Audain to the court, thereby making it a matter of public record. App. 1275, 1288, 1465). It is also without merit (e.g., the names of faculty members accused of sexual harassment would not have to be disclosed, also, there are other safeguards available to the courts in cases like this; see generally: J.A. Springer, P. Pollard & R.P. Arnette, "Survey of Selected Evidentiary Issues in Employment Litigation" 50 *Baylor L.Rev.* 415 (1998).

13 This Court recently reversed the D.C. Circuit when it attempted to create a new burden of proof in a discrimination case. *Crawford-El v. Britton* 523 U.S. 574 (1997). This is clearly the case here. The D.C. Circuit has announced a standard that states: "if plaintiff cannot get enough evidence because of a discovery restriction we impose, then plaintiff's claim will be dismissed because of insufficient evidence." This standard of evidentiary tautology is clearly a standard of impossibility. It is inconsistent with the Court's prior holdings (see also *Leatherman v. Tarrant City Narcotics Unit* 507 U.S. 163 (1993)). As for spoliation, destruction of material E-mail evidence by the University's agents implies that Dr. Audain survives summary judgment so that he might prosecute his case. See *Byrnie v. Town of Cromwell*, 243 F.3d 93 (2nd Cir. 2001).

III. THE LOWER COURTS SHOULD BE REVERSED WITH RESPECT TO DR. AUDAIN'S CONTRACT CLAIMS BECAUSE IN FAILING TO LOOK AT THE ENTIRE RECORD, THE DISTRICT COURT APPLIED A SUMMARY JUDGMENT STANDARD OVERRULED BY THIS COURT IN THE CASE OF *Reeves*, IT REFUSED TO RECONSIDER ITS RULING IN LIGHT OF REEVES AND WAS SUMMARILY AFFIRMED BY THE CIRCUIT COURT OF APPEALS.

Judicial silence toward the claims of a nonmovant is not now nor has it ever been the basis for granting summary judgment to a movant. Yet this is precisely what the District Court did with respect to Dr. Audain's contract claims. The facts in the record indicate several violations of his contract by the University. The court admitted that there were "several theories" regarding the University's breach of Dr. Audain's contract, C. App. at 15a, but the opinion proceeded to select and discuss only two of them. Summary judgment was then granted to the University with respect to *all* of Dr. Audain's contractual theories. What about the other theories?

Reeves is clear in reaffirming that the court is to look at all of the evidence in the record. It says nothing about selective judicial silence with respect to those claims against the movant that presage liability for the movant. Again, the standard applied by the District Court exceeds that rejected in *Reeves*. For, the evidence that the court failed to consider, demonstrates the University's liability with remarkable clarity.

Consider for example the process for adjudicating claims of sexual harassment specified by the Sexual Harassment Manual and incorporated into Dr. Audain's contract with the University. Does *anyone* doubt that Dr. Audain's contract was breached with respect to this process? *After* the matter had been

declared closed by the relevant administrator, the University's agents reopened it under the guise of a "bad judgment" standard. No witnesses were called, no statements were taken, and confidentiality was breached. On the basis of unsubstantiated allegations, sanctions were imposed and Dr. Audain was terminated from his employment with the University. All of this happened in explicit violation of a detailed formal process. App. 1084, 1093. The impact on Dr. Audain's reputation and teaching career were disastrous, so much so that he has not been able to secure employment as a law professor.

One finds no discussion of this claim in the court's opinion granting the University summary judgment with respect to all of Dr. Audain's contract claims. The record supports at least six other violations of Dr. Audain's contract by the University that the court's opinion simply ignores.[14] This standard of judicial advocacy is diametrically opposed to the summary judgment standard of *Reeves*. It should be reversed.

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14 1)Dean Grossman compelled Dr. Audain to participate in an "independent review" process which is nonexistent within the contract; 2) he submitted Dr. Audain's scholarship for external review, a standard for tenure yet denied him reappointment on that basis; 3)the Committee failed to rehear Dr. Audain's case; 4)the Provost denied him access to the University's grievance procedure; 5)the Committee subjected Dr. Audain to a "bad judgment" standard not provided for by the contract; 6)Dean Grossman had Dr. Audain evicted from his office during the term of his contract.

IV. THE LOWER COURTS SHOULD BE REVERSED WITH RESPECT TO PETITIONER'S MATRICULATION DISCRIMINATION CLAIM BECAUSE IN FAILING TO CONSIDER THE EVIDENCE, THE DISTRICT COURT APPLIED A SUMMARY JUDGMENT STANDARD OVERRULED BY THIS COURT IN THE CASE OF *Reeves*, IT REFUSED TO RECONSIDER ITS RULING IN LIGHT OF *Reeves* AND WAS SUMMARILY AFFIRMED BY THE COURT OF APPEALS.

In admitting that it fired Dr. Audain because he was in medical school, the University admitted to a *per se* violation of the D.C. statute. However, the issue before the Court turns on the appropriate standard for Rule 56 summary judgment. The District Court's opinion is clear in stating that it considered only the "objection" of university officials to the "full-time nature" of Dr. Audain's matriculation in medical school. C. App. at 33a. There is no statutory provision that allows an employer to escape liability because of its "reasonable" objection to an employee's matriculation. In fact, precisely the opposite is true.[15] However, assuming *arguendo* that the statute provides for a "reasonable objection" exception, clearly the court failed to consider the evidence altogether.

Reasonable? Not one bit of evidence shows a nexus between Dr. Audain's medical school matriculation and his putative incompetence as a law professor. Indeed, the facts show that his performance at the law school actually *improved* while he was in medical school. *All* of the evidence also

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15 Indeed, the statute clearly states that the "preferences" of an employer are *not* an "exception" to the applicability of the statute. C. App. at 52a.

indicates that Dr. Audain made a full-time commitment to the law school and not to his studies in medical school. Accordingly, the court's summary judgment standard fails to consider all of the evidence that is in the record. Worse, the court's ruling is premised on evidence about the "full-time nature" of Dr. Audain's commitment to medical school that *cannot be found in and is precisely controverted* by the evidence that is in the record. Additionally, by the court's own admission, the evidence is looked at in the light most favorable to the University, the movant for summary judgment. The court's summary judgment standard is in conflict with *Reeves* and should be reversed.

CONCLUSION

A national law school where some faculty members break the law and dissemble to conceal it; a legal institution where material evidence in a litigation is destroyed with no accountability- these are the grave issues in this case that are worthy of the attention of this great Court. Dr. Audain therefore respectfully requests that this Court reverse the summary judgment rulings of the lower courts and reopen discovery in this matter.

Respectfully submitted,

H. Vincent McKnight, Jr. Esq.
2000 L Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for Petitioner &
Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7048 September Term, 2000
94cv2676

LINZ AUDAIN
Appellant,

United States Court of Appeals
for the District of Columbia Circuit
Filed
JUNE 18, 2001
Clerk

v.

AMERICAN UNIVERSITY AND
AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW,
Appellees

BEFORE: Edwards, Chief Judge; Williams and Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its memorandum opinion filed November 16, 2000. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely

petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

/S/

/S/

/S/

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LINZ AUDAIN	)	**FILED**
	)	NOV. 16 2000
Plaintiff	)	
	)	
v.	)	**Cv. No. 94-2676(TFH)**
	)	
AMERICAN UNIVERSITY	)	
et al.	)	
	)	
Defendant	)	

MEMORANDUM OPINION

Pending before this Court is the plaintiff's motion for reconsideration of this Court's June 25, 1998 and October 8 1998 decisions, granting the defendant's motion for summary judgment with respect to the plaintiff's employment discrimination, matriculation discrimination, and breach of contract claims. Upon careful consideration of the plaintiff's motion, the opposition and reply thereto, and the entire record, the Court will deny the plaintiff's motion.

I. BACKGROUND

On November 10, 1994, Mr. Audain filed a complaint in the Superior Court for the District of Columbia, alleging racial discrimination, matriculation discrimination, breach of contract, and intentional interference with contractual relations. On December 14, 1994, the case was removed to this Court. The defendant then filed a counterclaim, alleging defamation and breach of contract/unjust enrichment. Mr. Audain ultimately withdrew his intentional interference with contractual relations

claim, and on December 12 1997, the Court granted the plaintiff summary judgment with respect to the defendant's defamation counterclaim. These actions left plaintiff's racial discrimination, matriculation discrimination, and breach of contract claims as well as defendant's breach of contract claim pending before the Court.

On June 25, 1998, the Court granted the defendants' motion for summary judgment on the plaintiff's race discrimination and matriculation discrimination claims. The Court held that the evidence in the record ultimately did not raise a genuine issue of material fact as to differential treatment based upon race or the plaintiff's matriculation. While the plaintiff could meet his prima facie requirements, the defendant rebutted his showing with four, nondiscriminatory justifications for refusing to reappoint the plaintiff to a tenure track faculty position, and the plaintiff failed to provide evidence sufficient for a jury to conclude that the defendant's explanations were pretext for discrimination. On October 8, 1998, the Court also granted the defendants' motion for summary judgment on the plaintiff's breach of contract claim. The Court found no evidence that American University violated Mr. Audain's employment contract, and therefore, there was no genuine issue of material fact in dispute.

II DISCUSSION

II Standard of Review

A motion brought pursuant to Federal Rule of Civil Procedure 59(e) gives the Court discretionary authority to reconsider an earlier ruling when there has been an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Anyanwutaku v. Moore, 151 F.3d 1053, 1057-58 (D.C. Cir. 1998)(quoting Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir 1996) (*per curium*)) (other citations omitted). "'[A] motion

to reconsider is not simply an opportunity to reargue facts and theories upon which a court has already ruled. . . A court will grant a motion to reconsider only if the moving party can present new facts or clear errors of law that compel a change in the court's prior ruling.'" Assassination Archives & Research Center v. CIA, 48 F.Supp.2d I (D.D.C. 1999)(quoting Amoco Prod. Co. v. Fry, 908 F.Supp.991, 994 (D.D.C. 1995), rev'd on other grounds, 118 F.3d 812 (1997)).

Under Federal Rule of Civil Procedure 60(b), "upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding" for one of several listed reasons. Rule 60(b)(6) is the residual, catch-all clause under which the court in its discretion may alter a final order for "any other reason justifying relief from the operation of the judgment." The Supreme Court has restricted this language, however, to apply only to "extraordinary" situations, Ackerman v. United States, 340 U.S. 193, 202 (1950) and the D.C. Circuit has stated that it "should be only sparingly used." Good Luck Nursing Home, Inc. v. Harris, 636 F.2d 572, 577 (D.C. Cir. 1980). See Twelve Jones Does v. District of Columbia, 841 F2d 1133, 1140 (D.C. Cir. 1988).

II Analysis

To support his motion for reconsideration, the plaintiff argues that this Court's previous rulings are inconsistent with the Supreme Court's decision in Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097 (2000).[1] The plaintiff has relied on

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1 Although the plaintiff relies on both Federal Rules of Civil Procedure 59(e) and 60 in making this motion, the plaintiff's rule 59(e) basis is vitiated by the fact that he filed this motion more than ten days after entry of the judgment he asks this Court to amend. The plaintiff appears to concede this fact by relying exclusively on Rule 60(b)(6) in his reply. The Court therefore treats the plaintiff's motion asone made pursuant to Rule 60(b)(6).

an erroneous premise; nothing in Reeves contravenes the standards that have been applied in this case. Thus, the plaintiff is unable to substantiate his claim of an intervening change of controlling law on which he relies for the purpose of Rule 60(b)(6) and for preventing application of the mandate doctrine. See LaShawn v. Barry, 87 F.3d 1389, 1393 n.3 (D.C. Cir. 1996).

In Reeves, a fifty-seven-year-old employee claimed that Sanderson Plumbing discriminated against him on the basis of age in terminating his forty-year employment because he failed to maintain accurate attendance records for the employees that he supervised. The jury returned a verdict in favor of the plaintiff, finding age discrimination, the district court denied the defendant's renewed motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. See Reeves, 120 S. Ct. at 2103-04.

The Court of Appeals for the Fifth Circuit reversed, holding that the plaintiff had not introduced sufficient evidence to sustain the jury's finding of discrimination. The court stated that while the plaintiff introduced sufficient evidence for a reasonable jury to find defendant's proffered justification for the plaintiff's termination to be pretextual, it did not present enough evidence specifically to show that age discrimination motivated the termination decision. See id. at 2104.

The Supreme Court reversed, stating that the Fifth Circuit had proceeded from the erroneous assumption that a prima facie case of discrimination combined with evidence sufficient for a reasonable jury to disbelieve the defendant's justification is necessarily insufficient as a matter of law to sustain a jury's finding of intentional discrimination. See id. at 2109. Thus, the Court held:

> [A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the

> trier of fact to conclude that the employer unlawfully discriminated. . . . This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.

Id. at 2109. In Reeves, the plaintiff adequately demonstrated the falsity of defendant's explanation by showing that he had properly maintained attendance records and casting doubt on whether he was responsible for any failure to discipline employees. Nonetheless, the Fifth Circuit concluded that this was insufficient because the plaintiff had not specifically demonstrated that age was the motivating factor behind the decision to terminate his employment. See id. at 2107-08. The Supreme Court, however, found that under the circumstances of the case, the jury could reasonably infer age discrimination from the record evidencing the falsity of the justification. See id., at 2108-10.

Reeves therefore stands for the proposition that sufficient evidence for a reasonable jury to disbelieve a proffered nondiscriminatory justification in combination with a prima facie showing can be sufficient to sustain a jury finding of discrimination. See id. at 2108-09. That holding does not change the outcome in this matter. This Court's previous rulings – affirmed on appeal – make clear that even though the Court has found that the plaintiff has made a prima facie showing, the defendant here has produced evidence of reasoned doubt, through four legitimate explanations, about the merits of the plaintiff's reappointment to a tenure-track position. The record does not contain sufficient evidence to demonstrate the falsity of the defendant's explanations, from which a reasonable

jury could infer discrimination in this case under Reeves. See id. Finally Reeves does not change the standard applied by the Court in finding no evidence of a violation of the plaintiff's employment contract. Therefore, the plaintiff has failed to make the requisite showing to warrant reconsideration of the Court's prior rulings and their affirmance by the D.C. Circuit.

III CONCLUSION

For the reasons stated above, the Court will deny the plaintiff's motion for reconsideration. An appropriate Order will accompany this Opinion.

November 16, 2000

/S/_____
Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LINZ AUDAIN	)	**FILED**
	)	NOV. 16 2000
Plaintiff	)	
	)	
v.	)	**Cv. No. 94-2676(TFH)**
	)	
AMERICAN UNIVERSITY	)	
et al.	)	
	)	
Defendant	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that the plaintiff's motion for reconsideration is **DENIED.**

November 16, 2000

/S/_____
Thomas F. Hogan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-7115 **September Term, 1999**
94cv02676

Filed On:
United States Court of Appeals
for the District of Columbia Circuit
Filed May 1 2000
Clerk

Linz Audain,

Appellant

v.

American University and
American University
Washington College of Law,
Appellees

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER, Clerk

by: /S/
Robert A. Bonner,
Deputy Clerk

Circuit Judge Tatel did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-7115 **September Term, 1999**
Civil Action No. 94-2676

Filed On:
United States Court of Appeals
for the District of Columbia Circuit
Filed MAR 14 2000
Clerk

Linz Audain,

Appellant

v.

The American University

Appellee

On Appeal from the United States District Court
for the District of Columbia

Before: **Ginsburg, Sentelle, and Henderson,**
Circuit Judges.

JUDGMENT

This case was heard on the record from the United States District Court for the District of Columbia and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 36(b). Accordingly, it is

ORDERED that the judgment from which this appeal has been taken be affirmed. Linz Audain brought this action

alleging that appellee The American University (American) unlawfully denied him reappointment to a tenure track position at American's Washington School of Law (WCL) on account of his race and his enrollment in medical school. American offered evidence of four legitimate, nondiscriminatory reasons for its action: (1) Audain's full-time medical school enrollment was viewed as interfering with his full-time professorial responsibilities, (2) his only recent scholarly publication received mixed external reviews, (3) his teaching methodology received mixed internal reviews and (4) his service to WCL was insufficient. Because Audain failed to meet his burden of producing evidence that these reasons were pretextual, summary judgment was appropriate. *See Samii v. Billington*, 195 F.3d 1, 3 (D.C. Cir. 1999)(citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248,256 (1981); *Paquin v. Federal Nat'l Mortgage Ass'n.* 119 F.3d 23, 27-28 (D.C. Cir. 1997); *Chen v. General Accounting Office*, 821 F.2d 732, 739 (D.C. Cir. 1987)).

The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* D.C. Cir. R. 41.

FOR THE COURT

by: /S/
MARK J. LANGER
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LINZ AUDAIN	)	
	)	
Plaintiff	)	
	)	
v.	)	No. 94-2676(TFH)
	)	
AMERICAN UNIVERSITY	)	
et al.	)	
	)	
Defendant	)	

OPINION

On June 25, 1998, the Court issued an Opinion and Order granting Defendants' motion for summary judgment on Plaintiff Linz Audain's race discrimination and matriculation discrimination claims. It reserved judgment on Plaintiff's breach of contract claim and requested that the parties submit supplemental briefs on that issue. This Opinion supplements the Court's June 25, 1998 Opinion. The Court finds that because there is no evidence that the University violated Mr. Audain's employment contract, there is no genuine issue of material fact in dispute and Defendants are therefore entitled to judgment as a matter of law on Plaintiff's breach of contract claim. Accordingly, the Court will grant Defendant's motion to dismiss Plaintiff's last remaining claim.

DISCUSSION[1]

Plaintiff's breach of contract claim focuses on whether the Washington College of Law ("WCL") breached its Full-Time Faculty Contract for the 1993-94 academic year when it denied his request for reappointment in February 1994. Mr. Audain presents several theories why the process by which he was terminated amounts to a breach of contract. First, he claims that the University breached the contract when it failed to reappoint him notwithstanding the fact that he fulfilled all the requirements in the Faculty Manual. Second, he maintains that Professor Schwartz's and Professor Hager's presence on the Rank and Tenure Committee created a clear conflict of interest.

Mr. Audain contends that the WCL was required to evaluate specific criteria in making its reappointment determination: educational and professional background; teaching; creative, scholarly and professional development; and professional conduct and service to the institution, community and discipline. He argues that because he met or exceeded all of the criteria for reappointment, the WCL breached its contract with him when it failed to reappoint him.

As the Court's June 25, 1998 Opinion discusses in detail, the WCL evaluated Mr. Audain's performance on each of the above-listed criteria, and found him lacking in each one. While Mr. Audain may disagree with the WCL's assessment of his qualifications, the Court finds that the WCL has provided more than sufficient justification for its appraisal of Mr. Audain. This Court will not second-guess the WCL's decision. See Villanueva v. Wellesley College, 930 F.2d 124, 129 (1st Cir. 1991) ("[I]t is not the function of the courts to sit as 'super-tenure committees'); Brousard-Norcross v. Augustana College

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1 The relevant factual background is discussed at length in the Court's June 6, 1998 Opinion.

Ass'n, 935 F.2d 974, 976 (8th Cir. 1991) ("[W]e will not sit as a 'super personnel council' to review tenure decisions").

Audain also argues that the WCL did not limit itself to the criteria specified in the faculty manual in evaluating him, but also considered other impermissible criteria, such as his judgment. Even if the WCL considered other criteria in making its decision, such action would not amount to a breach of contract. See Bresnick v. Manhattanville College, 864 F.Supp. 327, 328 (S.D.N.Y. 1994) (finding "were what is mentioned is clearly within a relevant category, it would be blind in the extreme to require the category to be specified in haec verba.")

Finally, Mr. Audain contends that the WCL breached its contract by knowingly allowing conflicts of interest to exist in his reappointment process. First, he alleges that Professor Schwartz, the chair of his Rank and Tenure Subcommittee, made two openly racist remarks. In the first instance, Professor Schwartz used a racially derogatory term during the discussion of a case. Mr. Audain concedes, however, that Professor Schwartz was not expressing his own sentiments but those of racist members of the Senate at the time the case was decided. The second "racist" statement was made when Schwartz was commenting on Audain's full-time student/faculty status. He stated, "You may be some kind of genius, but I've never heard of such a thing." Mr Audain interpreted this statement to mean that Schwartz believed he could not successfully be a full-time professor and a full-time medical student because of his race. The Court finds that neither of these statements would provide a reasonable fact-finder with a basis to conclude that Professor Schwartz' position as chair of Mr. Audain's Rank and Tenure Subcommittee created a conflict of interest.

Mr. Audain also maintains that Professor Hager's presence on his Rank and Tenure Committee presented a conflict of interest because Mr. Hager allegedly had once been involved in a consensual romantic relationship with a student.

Plaintiff does not adequately explain how this situation would constitute a conflict of interest; even if the allegation is true, it is unlike Mr. Audain's unique status of being the only faculty member against whom a complaint of sexual harassment and unwanted sexual advances has been lodged. The Court finds that no reasonable fact-finder could conclude that a conflict of interest was created by having either Professor Schwartz or Professor Hager evaluate Mr. Audain's bid for reappointment.

CONCLUSION

Because the Court finds that there is no evidence that the University violated Mr. Audain's Full-Time Faculty Contract for the 1993-94 academic year when it denied Mr. Audain's request for reappointment in February 1994, it will grant Defendant's motion to dismiss Plaintiff's breach of contract claim. As this is Plaintiff's last remaining claim, Plaintiff's Complaint will be dismissed. Thus, the only claim remaining in this case is Defendant's counter-claim for breach of contract. An Order will accompany this Opinion.

October 7, 1998

/S/_____
Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LINZ AUDAIN	)	
	)	
Plaintiff	)	
	)	
v.	)	No. 94-2676(TFH)
	)	
AMERICAN UNIVERSITY	)	
et al.	)	
	)	
Defendant	)	

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant's Motion to Dismiss is GRANTED as to Plaintiff's breach of contract claim. Because this was Plaintiff's last remaining claim, it is further

ORDERED that Plaintiff's complaint is DISMISSED; it is further

ORDERED that Defendant file a status report on its counter-claim for breach of contract by November 16, 1998.

October 7, 1998

/S/_____
Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LINZ AUDAIN	)	
	)	
Plaintiff	)	
	)	
v.	)	No. 94-2676(TFH)
	)	
AMERICAN UNIVERSITY	)	
et al.	)	
	)	
Defendant	)	

OPINION

Pending before the Court is Defendants' Motion for Summary Judgment on Plaintiff Linz Audain's race discrimination, matriculation discrimination and breach of contract claims. Upon consideration of the submissions of the parties and oral argument heard thereon, the Court will grant Defendants' motion as to the discrimination claims and will reserve judgment on the breach of contract claim.

I. FACTUAL BACKGROUND

Plaintiff Linz Audain was hired by American University Washington College of Law ("WCL") as an Assistant Professor in June 1989. (Compl. At 2.) For the following three years, Mr. Audain's Rank and Tenure Subcommittee unanimously voted to recommend that he be retained for the following academic years. Id. at 5-6.

On April 15, 1993, Mr. Audain was informed by Dean

Elliott Milstein that complaint charging sexual harassment had been made against him by a female student at the WCL. Id. at 7. The formal written complaint against Mr. Audain was the only such complaint filed against a a law school faculty member. (Def.'s Mot. For Summ. J. at 7, n.5.) On May 7, Plaintiff presented Dean Milstein and Interim Dean of Faculties, Ann Ferren, with a letter of understanding. (Compl. At 2.) This letter was to "satisfactorily bring [the situation] to a close." Id.

In 1993, while serving as a full-time faculty member at the WCL, Mr. Audain enrolled as a full-time medical student at Howard Medical School. (Pl.'s Opp'n Ex. 11 at 3.) During his enrollment, he took as many as 31 credit hours a semester. Id. He did not seek, nor did he obtain, permission from the WCL to do so. (Def.'s Reply at 13) In the Spring of 1993, Mr. Audain requested a reduced teaching load in order to do research and scholarship. (Pl's Opp'n of Maryland, Baltimore Campus. Id. at 3. In the fall of 1993, Dean Grossman asked Mr. Audain to chair the law school's Budget Committee. (Pl.'s Opp'n, Ex. 22.) Mr. Audain declined, claiming that he had a prior obligation to the ABA Committee on Haiti. Id. Mr. Audain failed to later inform Dean Grossman that the Committee never materialized. Id.

In the Fall of 1993, Dean Grossman discovered Mr. Audain's medical school enrollment. (Def.'s Mot. For Summ. J. at 5.) He immediately reported this information to the American Bar Association. (Id. Ex. 3). The ABA informed Dean Grossman that because Mr. Audain was enrolled as a full-time student, the ABA would not count him as a full-time faculty member for accreditation purposes. Id. The ABA subsequently put the WCL on probation because of the WCL's low student-faculty ratio. Id.

On February 3, 1994, the Subcommittee at the WCL responsible for reviewing Mr. Audain's record as a faculty member for purposes of reappointment and tenure

("Subcommittee") issued a memorandum to the Committee on Rank and Tenure on Mr. Audain's performance as a faculty member. (Pl.'s Opp'n, Ex. 11.) The Subcommittee, chaired by Professor Herman Schwartz, found that Mr. Audain had met the standard for reappointment in the areas of teaching, scholarship, and service to WCL and the legal profession. Id. The memorandum provided negative reviews, however, on Mr. Audain's commitment to his full-time teaching obligation, his scholarship, his classroom teaching, his faculty-student relations, and his service to WCL. Id. The Subcommittee relied on Plaintiff's matriculation as a student at Howard University School of Medicine as a basis to allege that he had not sufficiently fulfilled his teaching obligation to the WCL; it also expressed concern that the quantity of Mr. Audain's scholarship was low. Id. ("The Subcommittee believes that Professor Audain's record of actual publication of works written since coming to WCL raises concerns about progress toward satisfying the scholarship requirement for tenure."). Mr. Audain's "bar review" style of teaching received mixed reviews from the Subcommittee. Id. The Subcommittee also solicited correspondence from the allegedly harassed student and relied on those correspondences in concluding that Mr. Audain had shown "bad judgment" and thus was lacking in his faculty-student personal relations. (Compl. at 9.)

In February of 1994, the full Committee on Rank and Tenure of the WCL ("Committee") recommended to the Acting Dean, Claudio Grossman, that Mr. Audain not be reappointed as a tenure track faculty member at the WCL for the 1994-1995 academic year. (Comp. at 10.) In February, Mr. Audain asked Acting Dean Grossman to make a decision regarding Mr. Audain's reappointment, which Dean Grossman allegedly refused to do so. Id. In March, Mr. Audain met with Acting Dean Grossman and indicated to him that it would be appropriated for Dean Grossman to recommend Mr. Audain for tenure and not just reappointment. Id. Dean Grossman indicated that Mr. Audain could only be considered for tenure

if his scholarship was subject to external review. Id. at 11. He solicited, and Mr. Audain tendered, his American Law Review article for external review. Id. Plaintiff concedes that at least one of the four reviews received by Dean Grossman was negative. Id.

On June 17, 1994, after conducting his own de novo review, Acting Dean Grossman recommended that Mr. Audain not be reappointed as a tenure track faculty member and that he be issued a terminal year contract for the 1994-95 academic year. Id. His report indicated that Mr. Audain had failed to meet the standard for reappointment with respect to teaching, scholarship, and service to the WCL. Id. More specifically, he found that because three of the four outside reviews of Mr. Audain's article were negative, he did "not meet the standard of actual scholarly achievement" contemplated by the Faculty Manual; that Mr. Audain had taught only two different subjects throughout his five years at the law school, while most faculty teach three or four different subjects; and that Mr. Audain's unauthorized, full-time enrollment in medical school and his refusal to chair the Budget Committee were unacceptable. (Def.'s Mot. For Summ. J. at 8-9.) On July 13, 1994, Mr. Audain formally sought a hearing before the WCL Committee on Rank and Tenure. (Compl. at 10.) This meeting never took place. Id. at 12. On August 1, 1994, Mr. Audain was issued a terminal contract for the 1994-95 academic year. Id. at 11.

II PROCEDURAL BACKGROUND

On November 10, 1994, Mr. Audain filed a Complaint[1] alleging Breach of Contract; Racial Discrimination, in violation of both the D.C. Code §1-2512 and 42 U.S.C. §§1981, 1981(a)

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1 This Complaint originally was filed in the Superior Court for the District of Columbia. It was removed to this Court on December 14, 1994.

and 2000(e); Discrimination Based on Matriculation, in violation of D.C. Code §§1-2501 and 1-2512; and Intentional Interference with Contractual Relations. On June 6, 1995, Mr. Audain withdrew his claim brought under Title VII (41 U.S.C. 2000(e)) and his Intentional Interference with Contractual Relations claim. Thus, the race discrimination, matriculation discrimination and breach of contract claims remain. On July 6, 1995, Defendant American University filed a counterclaim against Mr. Audain, alleging defamation and breach of contract/unjust enrichment.[2] The Court granted Mr. Audain's Motion for Summary Judgment as to Defendant's defamation claim on December 12, 1997. The breach of contract/unjust enrichment counterclaim remains.

III LEGAL STANDARD

In order to withstand a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue of material fact in dispute. Fed. R. Civ.P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In the absence of such facts, "the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

In opposing summary judgment, a party is not entitled to rely on the allegations of its complaint. Rule 56 provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that

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2 Defendants also asked for injunctive and declaratory relief, but later withdrew this request. See Praecipe dated August 22, 1995.

there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

IV DISCUSSION

Defendants' Motion for Summary Judgment is based on three arguments. First, Defendants contend that there is no evidence to support Mr. Audain's racial discrimination claim because WCL's failure to reappoint him was based on non-discriminatory reasons, namely, his full-time medical school commitment, his poor scholarship, his poor teaching and his insufficient service to the University. Second, Defendants argue that the University did not unlawfully discriminate against Mr. Audain on the basis of matriculation. Finally, Defendants maintain that the evidence refutes Mr. Audain's allegation that the University failed to meet its contractual obligations to him. Each of Defendants' arguments will be discussed in turn.

1. Racial Discrimination Claims[3]

The Supreme Court's opinion in McDonnell Douglas Corp. v. Green established a three-part framework governing the order and allocation of proof in cases alleging discrimination under Title VII. 411 U.S. 792 (1973). The complainant must initially set forth a prima facie case of prohibited discrimination. Id. at 802. Upon satisfaction of this requirement, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. Id. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted" and "drops from the case." Texas Dept. of Community Affairs v.

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3 The Court is aware that a case pending in the U.S. Court of Appeals for the District of Columbia Circuit, Aka v. Washington Hospital Center, No. 96-7089, could possibly affect the discrimination analysis. Because, in the Court's view, a ruling on Defendants' motion has been outstanding for an inordinate amount of time, the Court will not await a decision in that case before ruling on this motion.

Burdine, 450 U.S. 248, 255 & n.10 (1981). The plaintiff then has the opportunity to demonstrate that "the proffered reason was not the true reason for the employment decision" and that the characteristic protected under Title VII was, in fact, the real reason for the employment action at issue. Id. at 256. At all times throughout this burden shifting approach, the plaintiff retains the ultimate burden of persuasion. Id.

Under the third step of the McDonnell Douglas analysis, the plaintiff has the opportunity to submit evidence establishing that the employer's proffered reasons are merely a pretext for discrimination. The plaintiff must produce evidence from which a rational fact finder could infer that the employer intentionally discriminated against him or her on the basis of the protected trait. In order to meet this burden, the plaintiff must proffer "significantly probative," admissible evidence showing that the employer's articulated reason for his discharge was a pretext for discrimination. See St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 515 (1993). The Supreme Court has defined pretext in this context as a showing that the employer's stated reason is false and that the real reason for the adverse employment decision was, in fact, discrimination. Id. at 515.

Here, to prevail on his racial discrimination claim, Mr. Audain must first establish a prima facie case of discrimination. He may establish a prima facie case by showing (1) that he is a member of a protected group; (2) that he was a candidate for reappointment and was qualified under the University's standards, practices or customs; (3) that despite these qualifications he was rejected; and (4) the tenured positions in the relevant department remained open at the time he was denied tenure/reappointment, in that others were granted tenure in the department during the same general time period. Villanueva v. Wellesley College, 930 F.2d 124, 129 (1st Cir. 1991). As to the second element, Mr. Audain need only show that his qualifications were at least comparable to those of a "middle group of tenure candidates as to whom both a decision

granting tenure and a decision denying tenure could be justified as a reasonable exercise by the tenure decision-making body." Id.

Defendants contend that because Mr. Audain cannot show that he was qualified for the position of associate professor, he has failed to make out even a prima facie case of discrimination.[4] While the question of whether Mr. Audain fulfilled his contract is open for debate, as discussed below, he clearly is "qualified" for the position of law professor. He held this position at the WCL, with some distinction, for several years. Therefore, the Court finds that Plaintiff has made his prima facie case.[5]

Because Mr. Audain has made a prima facie case of race discrimination, the next step in the McDonnell Douglas analysis is for Defendants to articulate some legitimate, nondiscriminatory reason for his rejection. Here, the University has several legitimate, nondiscriminatory reasons: Mr. Audain's full-time medical school enrollment, the mixed reviews of his scholarship, the mixed reviews of his teaching, and the fact that he did not provide sufficient service to the WCL. While any one of these reasons, standing alone, would provide the requisite

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4 Defendants do not allege that Mr. Audain has failed to meet any of the other requirements for a prima facie case.

5 As support for his prima facie case, Mr. Audain also claims that he was treated differently from a non-minority faculty member regarding his attempted sexual relationship with a student. (See Pl.'s Opp'n at 16.) The Court has already found that there is no non-minority faculty member who is similarly situated to Mr. Audain in this respect. (See March 15, 1996 Order at 2.) The written complaint of sexual harassment and unwanted sexual advances (as opposed to any consensual romantic relationship) against Mr. Audain was the only such complaint filed against a law school faculty member (Def.'s Mot. For Summ. J. at 7, n.5.) Mr. Audain is also the only person who has ever enrolled as a full-time medical student while employed as a full-time faculty member at the WCL.

legitimate nondiscriminatory reason for Mr. Audain's termination, each reason will be discussed in turn.

1. Full-Time Enrollment in Medical School

Mr. Audain's full-time enrollment in medical school while he was employed as a full-time faculty member by the WCL provides Defendant's first non-discriminatory reason for his termination. Defendants contend that Mr. Audain's full-time enrollment in medical school caused his performance to deteriorate, violated numerous provisions of the Faculty Manual and jeopardized WCL's accreditation with the ABA. Mr. Audain charges that the WCL based its opinions regarding his medical school conflicts on prejudgment and assumptions rather than on any evidence. He insists that there is no evidence that he spent any less time at the WCL after enrolling in medical school; he further contends that he did not violate the employee contract just by virtue of enrolling medical school.

Assuming, arguendo, that all of Mr. Audain's contentions are correct, his argument misses he point. Mr. Audain's conduct need not have amounted to a liberal breach of contract to constitute a legitimate, non-discriminatory reason for his termination. See Smith v. UNC, 632 F.2d 316, 346 (4th Cir. 1980) (holding that the law does not require that employment decisions are rational, only that they are nondiscriminatory). The University officials reasonably believed that Mr. Audain's full-time medical school commitment interfered with his full-time obligations to the WCL. The Court grants great deference to academic decisions surrounding reappointment and tenure. Villanueva, 930 F.2d at 128-29. The University's decision may be disturbed only if Mr. Audain can show that the University's reasons for the denial were "obviously weak or implausible" or that the standards for reappointment were "manifestly unequally applied." Id. Mr. Audain fails to make any such showing. Because WCL's belief that Mr. Audain's dual full-time commitments conflicted is reasonable, the Court will not disturb

the WCL's decision.

The final step in the McDonnell Douglas analysis provides Mr. Audain with the opportunity to demonstrate the Defendants' proffered reasons for his termination are a mere pretext for racial discrimination. See Burdine, 450 U.S. at 255. Mr. Audain offers no credible evidence that Defendants' stated reasons were pretextual. He concedes that the University officials were concerned about his enrollment in medical school. (See Def.'s Reply at 13.) Mr. Audain's challenge is merely an attempt to question the accuracy of the University's evaluation of his situation. This Court is not in the position to determine whether the University's decision was correct See Villanueva, 930 F.2d at 129 ("[I]t is not the function of the courts to sit as 'super-tenure' committees"). The court must simply be convinced that Defendants believed in good faith that a conflict existed. Rand v. CF Industries, Inc., 42 F.3d 1139, 1145 (7th Cir. 1991) ("Any pretext determination is concerned with whether the employer honestly believes in the reasons it offers, not whether it made a bad decision"). Here, it clearly was reasonable for the University to believe that a conflict existed when one of its full-time professors was also enrolled on a full-time basis in medical school.

Because Defendants have articulated a legitimate, non-discriminatory reason for terminating Mr. Audain fails to present any evidence that this reason is merely a pretext for discrimination, Defendants prevail on this non-discriminatory reason for Mr. Audain's termination alone.

2. Mixed Reviews of Scholarship

The mixed reviews that Mr. Audain's scholarship received at the time he was being considered for reappointment and/or tenure provides a second non-discriminatory reason for his termination. The single article Mr. Audain published since

he was promoted to Associate Professor in 1991[6] (See Pl.'s Opp'n Ex. 11 at 6.), was distributed for outside review as a result of Mr. Audain's request for tenure review.[7] Even Mr. Audain concedes that this article received some negative reviews. (Compl. at 11.) He contends that these negative reviews were a result of discrimination.

Mr. Audain first claims that these negative evaluations were based on external review of his article, and that external review was not required for reappointment. In his Complaint, however, Mr. Audain concedes that Dean Grossman told him that he could only be considered for tenure if his scholarship was subject to external review. (Compl. at 11.) Even if external review were not required, the fact that the WCL solicited additional evaluations is not evidence of racism. See Brousard-Norcross v. Augustana College Ass'n, 935 F.2d 974, 977 (8th Cir. 1991) (an effort to obtain additional student evaluations is not evidence of discrimination).

Mr. Audain also claims that the WCL's choice of outside reviewers skewed the results of the review. He alleges that Dean Grossman purposely chose reviewers who would provide negative reviews. The University maintains that it followed the WCL standard in seeking outside reviewers. (See Def.'s Mot. For Summ. J. at 8.) Mr. Audain's article was sent to twelve scholars, and four replied; the University had no control over who would reply. Id. The Court finds that Mr. Audain has presented no credible evidence that the composition of his external review panel was influenced by racial discrimination.

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6 The Economics of Law Related Labor V: Judicial Careers, Judicial Selection, and an Agency Cost Model of the Judicial Function, 42 Am. U.L.Rev. 116 (1992)

7 Only Dean Grossman had the benefit of reading these outside reviews, as Mr. Audain did not submit anything he had written to the Committee on rank and Tenure. (Pl.'s Opp'n Ex. 11 at 6.)

Next, Mr. Audain argues that he disagrees with WLC's assessment that the review of his article were particularly negative. While both parties quote selectively from the reviews to support their argument, the reviews of Mr. Audain's articles contain what could reasonably be construed as concerns regarding Mr. Audain's article. (See Pl.'s Opp'n, Ex. 27-30.)[8] The relevant inquiry is whether negative reviews exist, not whether the article was actually good or bad. See Villanueva, 930 F.2d at 129; see also Brousard-Norcross, 935 F.2d at 976 ("It is not for us to determine what constitutes a sufficient amount of negative feedback . . . before a denial of tenure is justified; we will not sit as a "super personnel council' to review tenure decisions"). Because there is no evidence that the review process was tainted by race discrimination, the Court will not intrude into this purely academic decision.

3. Mixed Reviews on Teaching

The University's concerns over Mr. Audain's bar-review method of teaching provide another legitimate, non-discriminatory reason for his termination. Mr. Audain claims that any criticism of his teaching is pretext for racial discrimination. First, he points out that previous evaluations described his teaching as "excellent" and "first rank;" in addition, Mr Audain received the "Professor of the Year" award from the WCL second-year and part-time students for the '94-'95 academic year. (Pl.'s Opp'n at 12.) Audain's attempts to rely on his prior positive evaluations does not establish that later negative evaluations are pretextual. See Billett v. Cigna Corp., 940 F.2d 812 (3rd Cir. 1991) (showing that employee had

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8 Plaintiff concedes that the review from Richard Epstein was negative. Robert Cooter's review remarks, "[i]n the end, however, the two fundamental problems addressed by the author remain unsolved. . . ." (Pl.'s Opp'n, Ex. 28.) Sheldon Goldman noted, "I see the work as having little impact on the literature." His letter also references his "somewhat lack of enthusiasm for this particular article." (Id., Ex. 29.)

received many previous favorable evaluations did not raise a question for the jury as to whether objective evidence of performance problems was pretextual). Defendants provide a reasonable justification for the change in Mr. Audain's evaluations over time. Mr. Audain had taught only two different subjects in the five years he had been with the WCL. (Pl's Opp'n at 12.) Further more, even at the subcommittee level, evaluations of Mr. Audain's classroom performance were not unanimously positive. (Pl's Opp'n Ex. 11 at 7.) ("The Subcommittee is divided over whether Professor Audain's classroom teaching meets the criteria for acceptable teaching.") Mere disagreement among University faculty regarding a candidate's qualifications raises no inference of discrimination or improper motive. See Zahorik v. Cornell Univ., 729 F.2d 85, 94 (2nd Cir. 1984); Villanueva, 930 F.2d at 131-32 ("It is apparent from the record that reasonable people could differ, and have differed, as to [plaintiff]'s qualifications for tenure. But we may not, and cannot, resolve the dispute. . . . [M]erely by showing that such a dispute exists, [defendant] has successfully dispelled any inference of discrimination"). The Court therefore finds that concerns over Mr. Audain's teaching provide a third non-discriminatory reason for his termination.

4. Lack of Service to the WCL

Defendants provide a fourth non-discriminatory factor leading to Mr. Audain's termination: the fact that he did not provide sufficient service to the WCL. Mr. Audain was asked to chair the WCL's Budget Committee, but declined, for the stated reason that he planned to work on the ABA Haiti Committee. Dean Grossman later discovered that the ABA committee never materialized. While his subcommittee concluded that, despite this incident, his service to the WCL was satisfactory, Dean Grossman concluded differently. Again, reasonable minds could differ as to Mr. Audain's qualifications. Such disagreement is not evidence of termination. Id.

5. Sexual Harassment Claim

In addition to the claims pretext that Mr. Audain makes in response to each of the University's non-discriminatory reasons for terminating him, he has an over-arching theory of pretext that he claims tainted the entire reappointment process. (See Pl.'s Opp'n at 16-21.) This argument of pretext relates to how the WCL treated his sexual relationship with a student. Mr. Audain claims that another faculty member had a sexual relationship with a student, was granted tenure, and sat on Audain's Rank and Tenure committee. He argues that even though the sexual harassment issue was allegedly "closed," the accusations made against him were relied upon by members of the Committee in their vote for non-reappointment. He maintains that the Rank and Tenure Committee was put on notice by one of its members that Mr. Audain, a minority faculty member, was being subjected to a different standard than the other professor had been.

Mr. Audain's argument relies on his theory that having a sexual relationship with a student, and not sexual harassment, was the behavior to which the faculty objected. The problem with Mr. Audain's theory is that he is the only faculty member against whom a written complaint of sexual harassment has been lodged. This unique status precludes Mr. Audain from comparing himself with other faculty members who may have had consensual relationships with students or other faculty members who may have had informal unwritten sexual harassment complaints lodged against them. Mr. Audain's assertions are not sufficient to support an argument of racial pretext.

B. Matriculation Discrimination Claim

The District of Columbia Human Rights Act prohibits:

. . . discrimination for any reason other than that

> of individual merit, including but not limited to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, matriculation, political affiliation, physical handicap, source of income and place of residence of business.

D.C. Code § 1-2501 (emphasis added).

Mr. Audain cites the D.C. Human Rights Act's prohibition on matriculation discrimination to support his contention that the WCL could not fire him based on his full-time enrollment in medical school. He also contends that because the D.C. statute, his enrollment in medical school cannot serve as a legitimate non-discriminatory reason for terminating him.

Unfortunately, the parties have not cited (and the Court is unaware of) any cases interpreting the D.C. Human Rights Act as to matriculation discrimination. The Court finds, however, that to apply the statute in Mr. Audain's situation would be illogical. Here, the WCL arguably did not discriminate against Mr. Audain based on his status as a student To the contrary, the WCL had accommodated Mr. Audain's status as a student at other times during his employment, by allowing him and others to finish Ph.D. work while remaining on the faculty. What the WCL's reasonably objected to was the full-time nature of Mr.Audain's commitment. The WCL's objection was reasonable, especially in light of the fact that the ABA refused to count Mr. Audain as a full-time faculty member, for accreditation purposes, because of his status as a full-time student. (Def's Reply at 17-18.) While Mr. Audain argues that the WCL would be powerless to stop its entire faculty from becoming full-time students. The Court cannot support such a conclusion. Surely the D.C. Human Rights statute cannot be interpreted to apply to Mr. Audain's situation.

C. Breach of Contract Claim

In his breach of contract claim, Mr. Audain alleges that "defendant breached its contract when it failed to reappoint him notwithstanding the fact that he fulfilled all the requirements under the Faculty Manual including teaching, scholarship, and service." (Pl.'s Opp'n at 37, citing Compl. ¶37.) The Court does not have sufficient information at this time to determine whether a genuine issue of material fact exists as to whether Defendant breached its contract with Mr. Audain. The Court will reserve judgment on the breach of contract issue until it has heard further oral argument on this matter. The Court would like clarification on the following issues:

1. What obligation, if any, did Defendant have to reappoint Mr. Audain?

2. Specifically which contract and which terms of that contract were allegedly breached?

3. Was the WCL limited to using any specific criteria in its determination of whether to renew Mr. Audain's contract?

4. If an Assistant Professor meets the criteria set forth in the Faculty Manual, is he or she guaranteed reappointment? Or does the WCL have total discretion in this decision?

5. How does Plaintiff's breach of contact claim square with the concept that courts must give great deference to academic hiring decision?

V. Conclusion

For the reasons discussed above, the Court finds that Defendants are entitled to a judgment as a matter of law on

Plaintiff's claims of racial and matriculation discrimination. Because the Court does not have sufficient information to determine whether Defendants properly terminated Plaintiff, the Court will reserve judgment on Defendants' Motion for Summary Judgment as to Plaintiff's breach of contract claim. An Order will accompany this Opinion.

June 25, 1998

/S/_____
Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LINZ AUDAIN	)	
	)	
Plaintiff	)	
	)	
v.	)	No. 94-2676(TFH)
	)	
AMERICAN UNIVERSITY	)	
et al.	)	
	)	
Defendant	)	

ORDER

For the reasons articulated in the accompanying Opinion, it is hereby

ORDERED that Defendant's motion is GRANTED as to Plaintiff's claims of racial discrimination and matriculation discrimination; it is further

ORDERED that the Court will reserve judgment as to Plaintiff's claim of breach of contract. The parties should contact the Court to set a date for a hearing on this issue. If the parties wish, they may file supplemental briefings on this issue by July 31, 1998.

June 25, 1998

/S/_____
Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LINZ AUDAIN	)	
	)	
Plaintiff	)	
	)	
v.	)	No. 94-2676(TFH)
	)	FILED
AMERICAN UNIVERSITY	)	DEC 12 1997
et al.	)	Nancy Mayer-Whittington,
	)	Clerk U.S. District Court
Defendant	)	

OPINION AND ORDER

Before the Court is plaintiff's Motion for Summary Judgment of defendant's two counterclaims against him: defamation and breach of contract/unjust enrichment.[1] After considering the briefs and materials submitted by the parties, the Court will grant plaintiff's motion as to defendant's defamation claim and will deny plaintiff's motion as to defendant's defamation claim and will deny plaintiff's motion as to defendant's breach of contract/unjust enrichment claim.

The Summary Judgment Standard

In order to withstand a motion for summary judgment, the opposing party must set forth specific facts showing that

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1 Defendant also asked for injunctive and declaratory relief in its counterclaim. Defendant later withdrew this request. See Praecipe dated Agust 22, 1995.

there is a genuine issue of material fact in dispute. Fed.R.Civ.P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In the absence of such facts, "the moving party is entitled to a judgment as a matter of law." Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986).

In opposing summary judgment, a party is not entitled to rely on the allegations of its complaint. Rule 56 provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise is provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

Defamation Claim

The facts in this matter do not appear to be in dispute. On November 10, 1994, Plaintiff Linz Audain filed a Complaint against defendant American University alleging breach of contract and discrimination in its failure to reappoint him as a Washington College of Law ("WCL") faculty member. Mr. Audain gave a copy of the Complaint to several law schools at the Fall 1994 Conference of the Association of American Law Schools. In addition, he provided copies of his Complaint to three WCL faculty members who had agreed to serve as references in his job search.

American University argues that Mr. Audain's circulation of the Complaint constitutes defamation and that Mr. Audain circulated his Complaint for the express purpose of injuring the University's reputation in the academic community. It argues that plaintiff's conduct was intentional, willful, malicious and/or grossly negligent, and was not privileged.

Mr. Audain cites three privileges in support of his assertion that defendant's counterclaim for defamation should be dismissed: the judicial proceedings privilege, the common interest privilege, and the publisher privilege. Because the Court finds that Mr. Audain's statements are protected under the common interest privilege, it does not reach the parties' alternative arguments regarding the other two privileges.

The common interest privilege is a qualified privilege that "exists when the publisher of a defamatory statement and the person to whom it is made have a common interest, and the communication is of a kind reasonably calculated to protect it." Roland v. d'Arazien, 685 F.2d 653, 655 (D.C.Cir 1982). To come within the protection of the common interest privilege, a statement must be "(1) made in good faith, (2) on a subject in which the party communicating has an interest. . . . (3) to a person who has such a corresponding interest." Moss v. Stockard, 580 A.2d 1011, 1024. "Whether a communication is privileged, where the facts surrounding its publication are undisputed, is a question of law for the court." Roland, 685 F.2d at 655. Whether a party abused the privilege (and thereby forfeited it) by acting with malice, recklessness or dishonesty, is a question of fact for the jury. Id. However, there must first be enough evidence to go to the jury on the issue of abuse of the privilege. Id.

The court finds that the communications at issue here are protected by the common interest privilege. Although American University argues that the other law schools had no interest in the University's employment practices, as detailed in the Complaint, defendant misstates the common interest that Mr. Audain and his prospective employers shared. A law school that is contemplating hiring Mr. Audain clearly would want to know the circumstances of his leaving the WCL. The Complaint constitutes Mr. Audain's version of the events that led to his termination – that is, that his termination was for reasons other than his lack of qualifications as a professor. It therefore

supports his assertions that, despite his termination from the WCL, he is qualified for a position as a law professor at another institution. Mr. Audain's distribution of the Complaint was narrowly tailored to meet this end. In his sworn affidavit, he states that he provided a copy of the Complaint only to those law schools that inquired as to his status at the WCL. One interviewer never inquired about his status at the WCL and therefore never received a copy of the complaint.

American University provides no support for its assertion that Mr. Audain acted with malice or bad faith. The University's only proffered evidence is a copy of a memorandum from Mr. Audain to one of his recommenders; the memorandum apparently accompanied the recommender's copy of the Complaint. The Court finds that this memorandum contains no hints of malice on Mr. Audain's part. Furthermore, American University offers no evidence suggesting that Mr. Audain gave his Complaint to anyone other than prospective employers and references for the sole purpose of acquiring other employment. Thus, although the issue of malice presents a question of fact, there is not enough evidence of it here to go to the jury.

Therefore, because there is no genuine issue of material fact on the question of malice and Mr. Audain's statements are protected by the common interest privilege. Mr. Audain is entitled to judgment as a matter of law. Plaintiff's motion for summary judgment as to defendant's counterclaim of defamation is granted.

Breach of Contract/Unjust Enrichment Claim

Mr. Audain argues that defendant's claim for breach of contract/unjust enrichment should be denied. American University's breach of contract/unjust enrichment claim rests on Mr. Audain's clandestine and unauthorized full-time enrollment in medical school while he was employed as a full-time faculty

member at the WCL. Defendant asserts that Mr. Audain violated his obligation under the Faculty manual to devote "substantially all" of his time to the law school. Furthermore, Mr. Audain's medical school enrollment jeopardized the law school's accreditation. Mr. Audain asserts that, although he was enrolled in medical school, he was nonetheless able to fulfill his contractual obligations to the law school. Because a genuine issue of material fact exists as to whether plaintiff met his contractual obligations with regard to his teaching duties, there exists a question of fact properly left to the jury. Therefore, plaintiff's motion for summary judgment as to defendant's claim for breach of contract/unjust enrichment is denied.

Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment is granted in part and denied in part. It is hereby

ORDERED that plaintiff's motion for summary judgment is GRANTED as to defendant's counterclaim for defamation; it is further

ORDERED that plaintiff's motion for summary judgment is DENIED as to defendant's counterclaim for breach of contract/unjust enrichment.

December 11, 1997

/S/_____
Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LINZ AUDAIN	)	
	)	
Plaintiff/Counterdefendant,	)	
	)	
v.	)	No. 94-2676(TFH/AK)
	)	FILED
AMERICAN UNIVERSITY	)	MAR 15 1996
et al.	)	Clerk, U.S. District Ct
	)	District of Columbia
Defendant/Counterplaintiff	)	

ORDER

Pending before the Court are numerous discovery-related motions. After reviewing the papers filed in connection with these motions, and hearing the parties' arguments at the status calls on January 25, 1996 and March 15, 1996, the Court will resolve the motions in the manner described below.

Plaintiff's December 21, 1995 Request for Reconsideration of Magistrate Judge's Rulings

In this request, the plaintiff seeks reconsideration of three rulings made by the Magistrate Judge on December 12, 1995. It is hereby ORDERED that the request [Docket #100] is granted in part and denied in part, as follows:

The plaintiff's request for an extension of time to name a liability expert is granted. The plaintiff shall identify this individual by Monday, April 7, 1996.

The plaintiff's request for the identities of the peer reviewers who commented upon the plaintiff's work is granted. The defendants must disclose the identities of these reviewers by

Friday, March 22, 1996, subject to an appropriate confidentiality order to be developed by the parties. The confidentiality order shall prohibit the parties from disclosing the reviewers' identities to anyone other than parties and counsel.

The plaintiff's request for information about informal oral complaints lodged against the defendant's faculty members is denied. The Magistrate Judge did not make a clearly erroneous decision in balancing the defendant's interest in privacy and the Court's interest in manageable litigation against the plaintiff's interest in acquiring information. Though the plaintiff should have some access to information about other faculty members' treatment against which he can compare his own treatment, such information is adequately provided by the rank and tenure reports discussed below and by the other discovery provided in this case.

Plaintiff's January 16, 1996 Request for Reconsideration of Magistrate Judge's Ruling

In this request, the plaintiff seeks reconsideration of a December 29, 1995 order of the Magistrate Judge prohibiting the plaintiff from questioning non-party witnesses about unwritten complaints of sexual harassment filed against the defendant's faculty members. It is ORDERED that this request [Docket #113] is denied. Again, the Magistrate Judge did not make a clearly erroneous decision in balancing the parties' interests. The rank and tenure reports discussed below and the other discovery provided in this case provide an ample opportunity for the plaintiff to compare himself to other faculty members in an employment status similar to the plaintiff's. It is true that the exclusion of information about unwritten complaints bars the plaintiff from discovering some information, but it is an accident of circumstance that the plaintiff finds himself alone in the category of faculty members against whom a written complaint was lodged. The Court will not broaden the class of appropriate discovery simply because the plaintiff finds

himself in a unique situation without similarly situated colleagues.

The plaintiff argues that at least one of the unwritten complaints is relevant to this case because it was discussed for comparison purposes at the plaintiff's rank and tenure review. However, the Court will not allow the plaintiff to question non-party witnesses about this unwritten complaint. It is understandable that the plaintiff is interested in this information, but it is facially clear that the person charged in the other complaint is not similarly situated to the plaintiff. For whatever reason, the other charge did not ripen into a written complaint and therefore did not require the same level of serious institutional response as did the written complaint against the plaintiff. In order to avoid intrusive disclosure and further expenditure of resources, and because the information does not concern a matter closely comparable to the plaintiff's situation, the Court will not allow the plaintiff to question nonparty witnesses about the unwritten complaint.

On March 14, 1996, the plaintiff filed a supplement to this request arguing that he had been improperly cabined in his questioning during the deposition of two of the defendant's faculty members. The plaintiff asked the Court to rule that certain questions were acceptable. The Court has reviewed the deposition transcripts provided by the plaintiff and believes that the defendant may have adopted too narrow a definition of relevance, even in light of the ruling set forth immediately above. However, the Court will not yet rule on the matter raised in the plaintiff's supplement. The parties are encouraged to resolve the issue together now that this order is issued, but if they are unable to do so the defendant may file an opposition o the plaintiff's supplement.

Plaintiff's March 5, 1996 Request for Reconsideration of Magistrate Judge's Ruling

The plaintiff seeks to compel Dean Claudio Grossman to answer further questions about his opinions with respect to the merits of the plaintiff's reappointment. The Court has reviewed the transcript excerpts of Grossman's deposition and concludes that Grossman answered all relevant questions at least once. Therefore, it is ORDERED that the motion for reconsideration [Docket #131] of the Magistrate Judge's February 8, 1996 denial of the motion to compel is denied.

Defendant's January 17, 1996 Motion for Reconsideration of the Magistrate Judge's Ruling

In this request, the defendant seeks reconsideration of that part of the Magistrate Judge's December 22, 1995 order compelling compliance with subpoenas served on twenty-eight of the defendant's faculty members. Because the plaintiff is entitled to information about rank and tenure reviews occurring during his employment with the defendant, it is ORDERED that the motion for reconsideration [Docket #114] is granted in part and denied in part. Those subpoenas seeking disclosure of rank and tenure reviews conducted during the period of the plaintiff's employment with the defendant are appropriate. All other subpoenas, which cover rank and tenure reviews for periods before or after the plaintiff's employment with the defendant are quashed.

Remaining Session(s) of Plaintiff's Deposition

The plaintiff is hereby ORDERED to make himself available for his continued deposition during regular weekday business hours.

Plaintiff's February 26, 1996 Motion for Extension of Discovery Period

The Court believes that some extension of the discovery period is necessary, since the parties were awaiting resolution of the above motions before completing discovery. It is therefore ORDERED that the plaintiff's motion for extension of the discovery period [Docket #129] is granted and discovery will close on Friday, April 26, 1996. It is anticipated that the parties will be able to begin preparing dispositive motions even before final discovery activities, such as the deposition of the plaintiff's liability expert, are completed.

March 15, 1996

/S/
Thomas F. Hogan
United States District Judge

STATUTES INVOLVED

42 U.S.C. SECTION 1981. *Equal rights under the law*

PUBLISH

SUBCHAPTER 1–GENERALLY

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subjects to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts' including the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment and color of State law.

STATUTES INVOLVED

D.C. CODE SECTIONS 1-2501 et seq. *Racial Discrimination; Matriculation Discrimination.*

PUBLISH

Subchapter I. General Provisions.

§ 1-2501. Intent of Council.

It is the intent of the Council, of the District of Columbia, its enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business. (1973 Ed., § 6-2201; Dec. 13, 1977, D.C. Law 2-38, title I, § 101, 24 DCR 6038; June 28, 1994, D.C. Law 10-129, § 2(a), 41 DCR 2583; Apr. 20, 1999, D.C. Law 12-242, § 2(a), 46 DCR 952.)

§ 1-2502. Definitions.

The following words and terms when used in this chapter have the following meanings:

(1) "Administrative Procedure Act" means the "District of Columbia Administrative Procedure Act," (D.C. Code, § 1-1501 et seq.).

(2) "Age" means 1 years of age or older.

(3) "Chairman" means the duly appointed Chairman of the District of Columbia Commission on Human Rights.

(4) "Commission" means the District of Columbia Commission on Human Rights, as established by Commissioner's Order No. 71-224, dated July 8, 1971.

(5) "Council" means the Council of the District of Columbia as established by § 1-221(a).

(5A) "Disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual having a record of such an impairment or being regarded as having such an impairment.

(6) "Director" means the Director of the District of Columbia Office of Human Rights, or a designate.

(7) "District" means the District of Columbia.

(8) "Educational institution" means any public or private institution including an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system or university; and a business, nursing, professional, secretarial, technical, or vocational school; and includes an agent of an educational institution.

(9) "Employee" means any individual employed by or seeking employment from an employer.

(10) "Employer" means any person who, for compensation, employs an individual, except for the employer's parent, spouse, children or domestic or domestic servants, engaged in work in and about the employer's household; any person acting in the interest of such employer, directly or indirectly; and any professional association.

(11) "Employment agency" means any person regularly undertaking or attempting, with or without compensation, to procure employees for an employer or to procure for employees, opportunities to work for an employer, and includes an agent of such a person.

(11A) "Familial status" means one or more individuals under 18 years of age being domiciled with: (1) a parent or other person having legal custody of the individual; or (2) the designee, with written authorization of the parent, or other persons having legal custody of individuals under 18 years of age. The protection afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or in the process of securing legal custody of any individual under 18 years of age.

(12) "Family responsibilities" means the state of being, or the potential to become, a contributor to the support of a person or persons in a dependent relationship, irrespective of their number, including the state of being the subject of an order of withholding or similar proceedings for the purpose of paying child support or a debt related to child support.

(13) "Hearing tribunal" means members of the Commission, or 1 or more hearing examiners, appointed by the Commission to conduct a hearing.

(14) "Housing business" means a business operated under the authority of a license issued by the Mayor, or other authorized District agent, pursuant to § 47-2828 and the regulations promulgated thereunder.

(15) "Labor organization" means any organization, agency, employee representation committee, group, association, or plan in which employees participate directly or indirectly; and which exists for the purpose, in whole or in part, of dealing with employer, or any agent thereof, concerning grievances, labor disputes, wages, rates of pay, hours, or other terms, conditions, or privileges of employment; and any conference, general committee, joint or system board, or joint council, which is subordinate to a national or international organization.

(15) "Make public" means disclosure to the public or to the news media of any personal or business data obtained during the course of an investigation of a complaint filed under the provisions of this chapter, but not to include the publication of EEO-1, EEO-2, or EEO-3 reports as required by the Equal Employment Opportunity Commission, or any other data in the course of any administrative or judicial proceeding under this chapter; or any judicial proceeding under Title VII of the Civil Rights Act of 1964 involving such information; nor shall it include access to such data by staff or the Office of Human Rights, members of the Commission on Human Rights, or parties to a place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream

parlors, confectionaries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores, and establishments dealing with goods or services of any kind, including, but not limited to, the credit facilities thereof; banks, savings and loan associations, establishments of mortgage bankers and brokers, all other financial institutions, and credit information bureaus; insurance companies and establishments of insurance policy brokers; dispensaries, clinics, hospitals, bathhouses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiards and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures, occupied by 2 or more tenants, or by the owner and 1 or more tenants. Such term shall no include any institution, club, or place of accommodation which is in its nature distinctly private except, that any such institution, club or place of accommodation shall be subject to the provisions of § 1-2531. A place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club:

(A) Has 350 or more members;

(B) Serves meals on a regular basis; and

(C) Regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

(25 "Political affiliation" means the state of belonging to or endorsing any political party.

(26) "Real estate broker (or salesperson)" means any person licensed as such in accordance with the provisions of

Chapter 19 of Title 45.

(27) "Real Estate Commission" means the Real Estate Commission of the District of Columbia established by § 45-1923.

(28) "Sexual orientation" means male or female homosexuality, heterosexuality and bisexuality; by preference or practice.

(29) "Source of income" means the point, the cause, or the form of the origination, or transmittal of gains of property accruing to a person in a stated period of time; including, but not limited to, money and property secured from any occupation, profession or activity, from any contract, agreement or settlement from federal payments, court-ordered payments, from payments received as gifts, bequests, annuities, life insurance policies and compensation for illness or injury, except in a case where conflict of interest may exist.

(30) "Transaction in real property" means the exhibiting, listing, advertising, negotiating, agreeing to transfer or transferring,, whether by sale, lease, sublease, rent, assignment or other agreement, any interest in real property or improvements thereon, including, but not limited to, leaseholds and other real chattels.

§ 1-2503. Exceptions.

(a) Any practice which has a discriminatory effect and which would otherwise be prohibited by this chapter shall not be deemed unlawful if it can be established that such practice is not intentionally devised or operated to contravene the prohibitions of this chapter and can be justified by business necessity. Under this chapter, a "business necessity" exception is applicable only in each individual case where it can be proved by a respondent that, without such exception, such business cannot be conducted; a "business necessity" exception cannot be justified by the facts of increased cost to business efficiency, the comparative characteristics of one group as opposed to another, the stereotyped characterization of one group as opposed to

another, and the preferences of co-workers, employers, customers or any other person. The business necessity exemption is inapplicable to complaints of unlawful discrimination in residential real estate transactions and to complaints alleging violations of the Fair Housing Act, approved April 11, 1968 942 U.S.C. § 3601 et seq.) ("FHA").

(b) Nothing in this chapter shall be construed to bar any religious or political organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious or political organization, from limiting employment, or admission to or giving preference to persons of the same religion or political persuasion as is calculated by the organization to promote the religious or political principles for which it is established or maintained.

(c) Nothing in this chapter shall be construed to supersede any federal rule, regulation or act.

(d) Nothing in this chapter shall prohibit any religious organization, association, or society or non-profit organization which is operated, supervised or controlled by or in conjunction with a religious organization, association or society from limiting the sales, rental or occupancy of housing accommodations which it owns or operates for other than a commercial purpose to members of the same religion or organization, or from giving preference to these persons, unless the entity restricts its membership on the basis of race, color, or national origin. This chapter does not prohibit a private club, not open to the public, which incident to its primary purpose, provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of these lodgings to its members or from giving preferences to its members. (1973 Ed., § 6-2203; Dec. 13, 1977, D.C. Law 2-38, title I, § 103, 24 DCR 6038; Apr. 20, 1999, D.C. Law 12, 242, § 2(c), 46 DCR 952.)

SUBCHAPTER II.
PROHIBITED ACTS OF DISCRIMINATION

§ 1-2511. Equal Opportunities

Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to in employment, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations. (1973 Ed., § 6-2211; Dec. 13, 1977, D.C. Law 2-38, title II. § 201, 24 DCR 6038.)

(a) *General.* – It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual:

(1) *By an employer.* – To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee;

(2) *By an employment agency.* – To fail or refuse to refer for employment, or to classify or refer for employment, any individual, or otherwise to discriminate against, any individual; or

(3) *By a labor organization.* – To exclude or to expel from its membership, or otherwise to discriminate against, any individual; or to limit, segregate or classify its membership; or to classify, or fail, or refuse to refer for employment any individual in any way, which would deprive such individual of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect his status as an

employee or as an applicant for employment; or

(4) *By an employer, employment agency or labor organization.* – (A) To discriminate against any individual in admission to or the employment in, any program established to provide apprenticeship or other training or retraining, including an on-the-job training program;

(B) To print or publish, or cause to be printed or published, any notice or advertisement, or use any publication form, relating to employment by such an employer, or to membership in, or any classification or referral for employment by such a labor organization, or to any classification or referral for employment by such an employment agency, unlawfully indicating any preference, limitation, specification, or distinction, based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, disability, or political affiliation of any individual.

(b) *Subterfuge.* – It shall further be an unlawful discriminatory practice to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, disability, or political affiliation of any individual.

(c) *Accommodation for religious observance.* – (1) It shall further be an unlawful discriminatory practice for an employer to refuse to make a reasonable accommodation for an employee's religious observance by permitting the employee to make up work time lost due to such observance, unless such an accommodation would cause the employer undue hardship. An accommodation would cause an employer undue hardship when it would cause the employer to incur more than de minimis costs.

(2) Such an accommodation may be made permitting the employee to work:

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No. 01-353

IN THE
Supreme Court of the United States

LINZ AUDAIN,

Petitioner,

v.

THE AMERICAN UNIVERSITY, *et. al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

AUDREY J. ANDERSON*
ROBERT B. CAVE
EMILY M. YINGER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5689

* Counsel of Record

Counsel for Respondents

3008

QUESTION PRESENTED

Whether it constituted an abuse of discretion for the courts below to deny petitioner's motion for reconsideration – where the motion was based on *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) – in circumstances where *Reeves* does not apply because petitioner failed to bring forward any evidence that respondents' four nondiscriminatory reasons for its employment action were not worthy of belief.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Linz Audain was the plaintiff-appellant below. Respondents, The American University, and the American University Washington College of Law, were the defendants-appellees below. Neither The American University nor the American University Washington College of Law have a corporate parent or a publicly held company owning 10 percent or more of its stock.

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IN THE

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No. 01-353

LINZ AUDAIN,

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THE AMERICAN UNIVERSITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

Respondents, The American University, *et al.*, hereby oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

INTRODUCTION

This case meets none of the criteria warranting certiorari. *See* S. Ct. R. 10. The decision below does not conflict with a case decided by this Court, or by any of the Courts of Appeals. It does not present any unsettled issue of federal law. What it does present is a commonplace application of this Court's well-established analysis in *McDonnell Douglas*

Corp. v. *Green*, 411 U.S. 792 (1973), to the particular facts of this employment discrimination case.

Petitioner, Linz Audain ("Audain"), attempted to combine a full-time career as a law professor with respondent, The American University ("the University"), with the full-time pursuit of a medical degree. Audain's attempt was ultimately unsuccessful because his medical school enrollment was accompanied by a sharp decline in his performance as a law professor. This decline in performance caused the University to decline to reappoint Audain to a full-time tenure track position at its law school. Audain claimed discrimination and breach of contract, and this suit followed.

The courts below carefully examined the record developed by the parties and granted summary judgment to the University because Audain had failed to bring forward sufficient evidence from which a factfinder could conclude that the four legitimate, nondiscriminatory reasons provided by the University for its action were a pretext for discrimination. Undeterred, Audain filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b)(6) on the basis of this Court's decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The courts below carefully considered that request and denied it after concluding, as detailed below, that *Reeves* failed to change the outcome of the case. It is that ruling that Audain seeks to challenge here.

The decision below is entirely consistent with *Reeves*. It furthermore presents no issue concerning the proper application of *Reeves* because, as the courts below correctly concluded, that ruling is not at all implicated by this case. Audain cannot show that the outcome of his case would be different if it were decided under the legal rule applied by any other court. The proper application by the courts below of well-settled legal principles under *McDonnell Douglas* and this Court's summary judgment jurisprudence presents no issue for review by this Court. The petition for certiorari should be denied.

COUNTERSTATEMENT

Factual Background. In 1994, the University, after full consideration, declined to reappoint Audain as a professor in its Washington College of Law. Audain had been promoted to Associate Professor in 1991, but in the period between that promotion and Audain's 1994 request for reappointment, his performance at the law school fell dramatically. The undisputed record below disclosed that Audain's teaching reviews, which had been excellent until 1991, began to decline in February 1992 and fell even further the following year. The quantity and quality of Audain's scholarship also fell. Audain wrote and published only one law review article in the two years after his 1991 promotion, and three of four reviewers of this single article concluded that Audain's work contributed nothing to the academic literature. In addition, Audain intentionally avoided service to the law school by refusing to chair the law school's critical Budget Committee, for which his business background provided particular expertise, reportedly to serve on a non-existent American Bar Association ("ABA") Committee on Haiti. *See* Pet. App. 20a-22a.

During this time period, the University had provided Audain with ample opportunity to improve. The University granted Audain's request for a reduced teaching load in the spring of 1993, purportedly for research and writing purposes. Pet. App. 20a. In addition, the University allowed Audain to teach the same two courses throughout his entire time at the law school, even though other faculty were ordinarily required to teach at least three or four different classes in any given year, which required a significantly greater amount of preparation time. Pet. App. 22a. Audain did not use these opportunities to increase the quantity of his published legal scholarship. Pet. App. 21a.

Not surprisingly, the decline in Audain's performance coincided with his undisclosed enrollment as a full-time medical student at Howard University in the fall of 1993. While enrolled as a full-time medical student, Audain enrolled in as many as 31 credit hours of medical school

classes per semester, without obtaining the University's permission or even informing it of his outside commitment. Pet. App. 20a. When the Acting Dean of the law school, Claudio Grossman, discovered Audain's medical school enrollment later in the fall of 1993, he immediately informed the ABA. *Id.* The ABA responded that because Audain was enrolled as a full-time student, the ABA would not count him as a full-time faculty member for accreditation purposes. *Id.* The ABA later put the law school on probation because of its student-faculty ratio. *Id.*

Meanwhile, Audain requested to be reappointed for the 1994-95 academic year. His request was initially reviewed by a three-member Subcommittee which released a report finding that Audain met the standard for reappointment in the areas of teaching, scholarship, and service to the University and the legal profession. Pet. App. 21a. The Subcommittee report, however, contained several negative reservations. These included Audain's lack of scholarly work; his "bar review" teaching style; his full-time medical school enrollment which interfered with his full-time teaching and research obligations; and a written complaint alleging sexual harassment filed against Audain the previous year by a female law student. *Id.* The Rank and Tenure Committee reviewed the Subcommittee's report, conducted its own investigation, and recommended that Audain be offered a one-year reappointment conditioned on his resignation from medical school. When Audain chose not to resign from medical school, his request for reappointment was denied. *See id.*

Dean Grossman then conducted an independent review of Audain's academic performance. He concluded that Audain failed to meet the requirement for scholarship because three of the four external evaluations of his scholarship were negative; failed to meet the law school's service requirements and; by enrolling full-time in medical school without the University's knowledge, had deprived the law school of a full-time faculty member for accreditation purposes. Pet. App. 20a, 22a. Based on these conclusions, Dean Grossman recommended that Audain's request for reappointment be

denied, and his recommendation was adopted. Accordingly, Audain was offered a terminal contract for the 1994-95 academic year. *Id.* at 22a.

Proceedings Below. In November 1994, Audain filed a complaint against the University alleging breach of contract, intentional interference with contractual relations, racial discrimination in violation of District of Columbia law and 42 U.S.C. §§ 1981, 1981(a) and 2000e, and discrimination on the basis of matriculation in violation of D.C. Code §§ 1-2501 and 1-2512.[1] The University filed a counterclaim against Audain for breach of contract. After the complaint was removed to the District Court, Audain actively conducted over seventeen months of discovery, including sixteen depositions. After the close of discovery, the University moved for summary judgment.

In two separate orders, the District Court granted summary judgment to the University on all of Audain's remaining claims. Pet. App. 14a, 19a. In considering Audain's discrimination claims, the District Court employed the burden-shifting analysis developed by this Court in *McDonnell Douglas*, 411 U.S. 792, and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Pet. App. 24a-25a. The court concluded that Audain had established a prima facie case. Pet. App. 26a. It then found that the University had provided four separate nondiscriminatory reasons for its action. In reviewing each of these reasons, the District Court concluded that Audain had failed to raise an issue of material fact concerning whether any of these reasons were a pretext for discrimination. First, Audain had enrolled as a full-time medical student while he was employed as a full-time professor. Pet. App. 27a. Audain did not inform the University of his enrollment in medical school, which jeopardized the University's accreditation with the ABA. *Id.* Second, Audain's published scholarship between 1991 (when he was promoted to Associate Professor) and 1994 (when he was considered for reappointment) consisted of a single article

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[1] Audain withdrew his claim brought under 42 U.S.C. § 2000e and for intentional interference with contractual relations.

that received mixed reviews from a panel of external reviewers, which the University assembled at Audain's request. Pet. App. 28a-29a. Third, Audain's "bar-review" style of teaching received mixed reviews and concerned the University. Pet. App. 30a-31a. Fourth, Audain failed to provide sufficient service to the University, particularly when he declined a request to chair the law school's Budget Committee on the pretense of service on an ABA Committee that never materialized. Pet. App. 31a. As for Audain's breach of contract claim, the District Court found "no evidence that the University violated Mr. Audain's employment contract," and therefore, there was "no genuine issue of material fact in dispute." Pet. App. 14a.

Audain obtained a Rule 54(b) certification from the District Court in order to appeal these interlocutory rulings.[2] The Court of Appeals affirmed the District Court's summary judgment rulings as to all of Audain's claims, Pet. App. 12a, and denied Audain's request for rehearing *en banc*. Pet. App. 10a. Audain then sought to file a petition for a writ of certiorari to this Court, which was out-of-time and therefore not accepted for filing.

The Motion for Reconsideration. Audain next filed, on October 12, 2000, a motion for reconsideration. Audain asserted that the District Court's summary judgment decisions, issued on June 25, 1998 and October 8, 1998, were inconsistent with this Court's decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, issued on June 12, 2000.

The District Court denied the motion for reconsideration. After noting that a motion for reconsideration under Rule 60(b) should only be granted in " 'extraordinary' " situations, the District Court proceeded to consider *Reeves*. Pet. App. 5a (quoting *Ackerman v. United States*, 340 U.S. 193, 202

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[2] The University's counterclaim for breach of contract was still pending before the District Court. *See* Pet. App. 17a. To bring this matter to a close, the University dismissed that claim on February 16, 2001.

(1950)).[3] The court concluded that *Reeves* "stands for the proposition that sufficient evidence for a reasonable jury to disbelieve a proffered nondiscriminatory justification in combination with a prima facie showing can be sufficient to sustain a jury finding of discrimination." Pet. App. 7a.

The District Court reasoned, however, that *Reeves* did not apply. While Audain had made a prima facie showing,

> the defendant here has produced evidence of reasoned doubt, through four legitimate explanations, about the merits of the plaintiff's reappointment to a tenure-track position. *The record does not contain sufficient evidence to demonstrate the falsity of the defendant's explanations, from which a reasonable jury could infer discrimination in this case under* Reeves.

Pet. App. 7a-8a (emphasis added). In other words, because Audain had failed to meet his burden of showing that the University's stated reasons were a pretext for discrimination, summary judgment was warranted without even reaching the question presented by *Reeves* of whether the plaintiff had produced evidence of discrimination in addition to his prima facie case. Because *Reeves* did not affect the outcome in Audain's case, the District Court denied the motion for reconsideration.

Audain appealed the denial of the motion for reconsideration. The Court of Appeals, through a different panel than had previously considered Audain's claims, summarily affirmed, "substantially for the reasons stated by" the District Court. Pet. App. 1a.

The petition for writ of certiorari followed.

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[3] The District Court rejected Audain's request for reconsideration pursuant to Fed. R. Civ. P. 59(e) because it was made more than 10 days after the entry of the judgment Audain sought to amend. Pet. App. 5a n.1.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *REEVES*

The decision below does not implicate – and therefore is not inconsistent with – this Court's decision in *Reeves*. The rule in *Reeves* has no application here because Audain failed to bring forward sufficient evidence from which a factfinder could conclude that the University's reasons for its action were pretextual. Moreover, the controlling law of the District of Columbia Circuit at the time it affirmed summary judgment against Audain was entirely consistent with this Court's subsequent holding in *Reeves*. Therefore, the courts below were correct in refusing to reconsider the entry of summary judgment against Audain, and the decision below is in no way inconsistent with *Reeves*.

The issue decided in *Reeves* concerns the evidence required for a plaintiff to survive judgment as a matter of law – the same standard applied in deciding a motion for summary judgment – where the plaintiff has established a prima facia case *and* has also provided evidence that would permit a factfinder to conclude that the defendant's proffered reasons were pretextual. *See Reeves*, 530 U.S. at 140 ("We granted certiorari . . . to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination . . . *combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision*, is adequate to sustain a finding of liability for intentional discrimination.") (emphasis added). Here that question was quite properly never reached, because the District Court – affirmed by the Court of Appeals – found that the evidence presented by Audain would not permit a reasonable factfinder to conclude that the University's four legitimate, nondiscriminatory reasons for declining to reappoint Audain were pretextual. *See* Pet. App. 1a, 7a-8a.[4]

[4] Audain so much as admits that *Reeves* does not apply, based on the findings made by the District Court. *See* Pet. 13. Much of the

In denying Audain's motion for reconsideration, the District Court carefully considered *Reeves* and concluded that it "does not change the outcome in this matter." Pet. App. 7a. The court's denial of reconsideration, based on its conclusion that the holding in *Reeves* did not change the standard used to decide Audain's discrimination claims, was correct. A legal standard that does not even apply to the case at issue cannot present the extraordinary circumstances necessary to support a motion for reconsideration. *See Agostini* v. *Felton*, 521 U.S. 203, 239 (1997) ("[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)"). That the courts below were well within their discretion in denying the motion for reconsideration, by itself, provides ample reason to deny the petition for certiorari. *See Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 263 n. 7 (1978) ("an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review").

Even if, however, the underlying grant of summary judgment to the University were at issue here, and even if this Court's decision in *Reeves* were implicated, there would still be no reason to grant certiorari. When summary judgment was entered against Audain, the controlling law in the District of Columbia Circuit was, as it is today, entirely consistent with *Reeves*. *See Aka* v. *Washington Hosp. Ctr.*,

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petition is devoted, however, to arguing that the District Court was mistaken in finding that Audain had failed to bring forward any evidence that the University's stated reasons were a pretext for discrimination. In addition to failing to present a legal issue for this Court to review, Audain's argument is wrong. Audain offers nothing to contradict the findings of the District Court except his subjective evaluation of his own scholarly merit, inviting this Court to override improperly the University's carefully reasoned, *academic* decision. *See, e.g., University of Penn.* v. *EEOC*, 493 U.S. 182, 199 (1990) ("This Court itself has cautioned that 'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.'") (quoting *Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 225 (1985)).

156 F.3d 1284, 1291 (D.C. Cir. 1998) (*en banc*).[5] In *Reeves*, this Court described the rule adopted by the District of Columbia Circuit in *Aka* as establishing that a "plaintiff's discrediting of [an] employer's explanation is entitled to considerable weight, *such that plaintiff should not be routinely required to submit evidence over and above proof of pretext.*" *Reeves*, 530 U.S. at 140 (citing *Aka*, 156 F.3d 1284) (emphasis added). Thus, *Reeves* did not change the prevailing law in the District of Columbia Circuit.

The Court of Appeals affirmed the grant of summary judgment to the University in March of 2000, well after it had decided *Aka*. Accordingly, even if Audain were correct that a rule inconsistent to *Reeves* was applied to his case – which, as discussed above, is clearly not the case – he would still fail to present an issue warranting certiorari because the governing legal rule in the District of Columbia Circuit was, and is, in no way inconsistent with *Reeves*. Audain's plea for this Court to review – on denial of a motion for reconsideration – the fact-bound application of the established legal rule to the particular situation presented by his case plainly does not warrant certiorari.[6]

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[5] In *Aka*, the District of Columbia Circuit rejected the "pretext plus" standard, explaining that it "reject[ed] any reading of *Hicks* under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer's stated explanation in order to avoid summary judgment." *Aka*, 156 F.3d at 1291 (citing *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502 (1993)).

[6] Audain's assumption – for it is never explained how one could reach such a conclusion – that *Reeves* somehow changes the law applicable to his claim for breach of contract or "matriculation discrimination" is wholly without support in law or logic.

Audain's argument that *Reeves* somehow affects the standards applicable to discovery borders on the absurd. Moreover, as a factual matter, these claims have no basis in the record. Audain never raised below any issue concerning the alleged "spoliation of evidence." Pet. 19. In addition, in accord with *University of Penn.* v. *EEOC*, the University produced to Audain voluminous files from its peer review committee. The District Court's decision that the written claim of sexual harassment made against Audain was

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE OTHER COURTS OF APPEAL

Nor is Audain correct to argue that the outcome of his case would be different if it had been decided by another of the Courts of Appeals. Pet. 13-14. As an initial manner, any inconsistency between the Courts of Appeals in the application of *Reeves* simply is not raised by this case because, as discussed above, the failure of Audain to present evidence to show that the University's reasons for its employment action were pretextual means that the rule in *Reeves* has no application here. *See Zimmerman* v. *Associates First Capital Corp.*, 251 F.3d 376, 381-82 (2d Cir. 2001) (asserting Courts of Appeals are employing different formulations in applying *Reeves*).

Moreover, none of the Courts of Appeals has adopted the rule Audain suggests, *i.e.*, that any plaintiff who establishes a prima facie case thereby automatically raises a genuine issue of material fact sufficient to preclude summary judgment in favor of the employer. The single case directly relied on by Audain for this proposition, *Blow* v. *City of San Antonio*, 236 F.3d 293, 296-97 (5th Cir. 2001), actually reaffirms and *implements* the traditional burden-shifting framework established by this Court in *McDonnell Douglas*, and properly applied by the courts below. In *Blow*, the Fifth Circuit did not end its summary judgment inquiry at plaintiff's proffer of a prima facie case as Audain asserts. To the contrary, the court explicitly examined whether the employer's proffered nondiscriminatory rebuttal was believable and reversed summary judgment in favor of the employer because the plaintiff "presented sufficient evidence to create a material

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not comparable to any other such claim made against a law school faculty member, Pet. App. 43a-44a, is a factual determination which certainly does not warrant review by this Court.

issue of disputed fact *as to whether the employer's explanation was false*."). *Id.* at 298 (emphasis added).[7]

Nor do the other cases cited in the petition support Audain's argument. *See* Pet. 15 & n.9. While the Ninth Circuit has interpreted *Reeves* to mean that a plaintiff who has established a prima facia case may, in some instances, escape the entry of judgment against him as a matter of law without facing an additional burden *of production*, even there the Court of Appeals clearly echoed this Court's earlier decisions, stating that "the plaintiff always retains the burden *of persuasion*." *Chuang* v. *University of Cal. Davis*, 225 F.3d 1115, 1127 (9th Cir. 2000) (emphasis added); *see also Gordon* v. *United Airlines, Inc.*, 246 F.3d 878, 886 (7th Cir. 2001). That is, in some cases evidence of a prima facie case will be so strong as to also demonstrate pretext. That is not the case here.[8] In sum, Audain fails to demonstrate a conflict in the legal standards applied by the Courts of Appeals that would change the outcome of this case and therefore certiorari should be denied.

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[7] In fact, Audain's argument is directly at odds with language in *Blow* explaining that the *employer* may be "entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue . . . ." *Blow*, 236 F.3d at 298 n.3. This portion of *Blow* directly supports the decisions below.

[8] The facts in *Chuang* stand in marked contrast to the facts here and provide no support for Audain's argument concerning pretext. *Cf.* Pet. 15. In *Chuang*, the plaintiff demonstrated "extraordinary" qualifications as a microbiologist and academic who was widely published and a leading researcher in his field. 225 F.3d at 1127. The plaintiff in *Chuang* was forcibly evicted from his research space while still employed by the University, and that eviction compromised his research and continued grant funding. *Id.* at 1125. Audain's qualifications were far from extraordinary and he refused to vacate his office at the University *months* after his teaching contract had expired, and not until the University filed a motion for a temporary restraining order. Furthermore, after his terminal contract had expired, Audain, among other things, improperly held himself out as being affiliated with the University and used University space for his own personal business activities.

III. THIS CASE INVOLVES NO UNSETTLED ISSUE OF FEDERAL LAW

Finally, certiorari is not warranted here because the petition fails to raise any unsettled issue of federal law. Whether Audain's motion for reconsideration was properly denied fails to raise any unsettled legal issue. The remainder of the questions presented by Audain would require a close inquiry by this Court into whether the District Court erred in its discovery rulings, whether the District Court "fail[ed] to look at the entire record" with regard to Audain's breach of contract claim, and the proper interpretation of law peculiar to the District of Columbia concerning "matriculation" discrimination. None of these questions are properly presented by Audain's appeal of the denial of his motion for reconsideration. *See Browder*, 434 U.S. at 263 n.7. Moreover, rather than asserting that any of these rulings raise an unsettled issue of federal law, Audain merely argues that they were wrongly decided on the facts of this case. The rulings by the courts below on these issues, in addition to being correct, raise no unsettled issue of federal law and plainly do not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

AUDREY J. ANDERSON*
ROBERT B. CAVE
EMILY M. YINGER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5689

* Counsel of Record

Counsel for Petitioner

Supreme Court, U.S.
FILED
OCT 9 2001
CLERK

(3)

No. 01-353

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

LINZ AUDAIN,

Petitioner,

v.

THE AMERICAN UNIVERSITY, AND
AMERICAN UNIVERSITY,
WASHINGTON COLLEGE OF LAW LAW,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Reply to Opposition

H. Vincent McKnight, Jr., Esq.
2000 L Street, N.W., Suite 400
Washington, D.C. 20036
(202) 783-6400
Counsel of Record &
Counsel for Petitioner

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I. THE OPPOSITION FILED BY THE UNIVERSITY DOES NOTHING TO ALTER THE CONCLUSION THAT THE LITERAL AND DE FACTO STANDARDS APPLIED BY THE DISTRICT COURT IN THIS CASE ARE STANDARDS THAT CONFLICT WITH THE STANDARDS ANNOUNCED BY THIS COURT.

In its Opposition to Dr. Audain's Petition for Writ of Certiorari ("Opposition"), the University argues that the Petition for Writ of Certiorari ("Petition" or "Cert. Petition") should not be granted because the case is not cert-worthy. It offers three reasons for this. First, the University argues that the case merely involves a review of the District Court's discretion in failing to grant Dr. Audain's Motion for Reconsideration. Second, it argues that the controlling law in the D.C. Circuit was already consistent with *Reeves*. Third, the University argues that the case merely involves the application of law to fact and as such is unworthy of this Court's attention. These arguments are without merit.

First, an abuse of discretion standard is wholly irrelevant to this case. This is because the District Court had no discretion in deciding whether it would apply a controlling and intervening case announced by this Court. In his Motion for Reconsideration, Dr. Audain took great pains to point out to the District Court that it was not being asked to reconsider its rulings under Rule 60(b)(6) because that rule deals with reconsideration of a final judgment and the judgments being reconsidered were Rule 54(b) interlocutory judgments and not final judgments. Consistent with the doctrine long-established by this Court in *Sears v. Mackey* 351 U.S. 427, 435 (1956), the District Court was apprised that it did not have the discretion to make final that which was not final. Moreover, the District Court was apprised - that Dr. Audain's Motion for Reconsideration involved a rather straight-forward application of the *Schooner Peggy* doctrine (*United States v. The Schooner Peggy* 5 U.S. (1 Cranch) 103 (1801). Specifically, *Reeves* was

an intervening case announced by this Court that the District Court was obliged to apply to Dr. Audain's case, a pending case.

The District Court would hear none of it. It is for this reason that the court's opinion denying Dr. Audain's Motion for Reconsideration makes reference to Rule 60(b)(6). It is this language that the University cites in its Opposition to Dr. Audain's Cert. Petition. However, the University's citation of the District Court's legal error does not change its character as legal error. Indeed, the University even admitted that the court had committed legal error in treating its interlocutory judgments as final judgments. For, in the very next motion that it filed before the court, a motion to sever its counter claim from Dr. Audain's claims, the University asked the court to enter final judgment in this matter. Accordingly, the University's reliance on *Agostini* and *Browder* in its Opposition (p. 9) are thoroughly inapposite because those cases deal with Rule 60(b)(6) (post-final judgment) relief and that is not the relief that was sought in this case. "Extraordinary circumstances" (*Id*) were not required for the District Court to apply *Reeves*. An application of the District Court's discretion was not involved and this Court is not being asked to review such an application of discretion.

What *is* being respectfully requested of this Court by Dr. Audain, consistent with Rule 10 c) of the Court is that it exercise its supervisory power over the lower courts to reign in a lower court which by its own language refuses to adopt standards of law announced by this Court. Rule 10 c) is of course the logical and statutory counterpart of the *Schooner Peggy* doctrine for if, as the doctrine announces, the lower courts must adopt the standards announced by this Court, then it follows that this Court will reverse them when they fail to do so. Certainly, there is no issue, and the University does not suggest that there is one, as to the continued vitality of the *Schooner Peggy* doctrine in the modern jurisprudence of this Court. See e.g., *Miller v. French* 530 U.S. 327, 344 (2000) (citing *Schooner Peggy* for the proposition that lower courts "must decide according to existing laws."); *Lawrence v. Chater*

516 U.S. 163, 180 (1996, Scalia, J. dissenting) (citing *Schooner Peggy* for the proposition that intervening law "must be obeyed.")

Second, the University argues that cert should be denied here because *Aka* was the controlling case in the D.C. Circuit at the time that the District Court's summary judgment was affirmed and *Reeves* was consistent with *Aka*. Assuming *arguendo* that this is true then the University has happened upon the precise argument why cert *should* be granted in this case. For, here we have a District Court which by the very language in its opinion denying Dr. Audain's Motion for Reconsideration, invokes a standard of actual discrimination in violation of the standard announced in its own circuit and by the Supreme Court. If the circuit court refuses to act, then it is precisely in this context that this Court is called upon to exercise its supervisory power over both lower courts.

Yet the reality of this case, as made clear by footnote 3 of Judge Hogan's opinion of June 25, 1998 (Cert. Pet. at 24a) is that *Aka* was pending at the time of his opinion. Judge Hogan was the judge subsequently reversed by *Aka*. The standard requiring proof of actual discrimination in discrimination cases that he applied in Dr. Audain's case was precisely the standard reversed in *Aka*. *Reeves* removed any doubt whatsoever as to the inapplicability of such a standard. On the basis of *Reeves* therefore, Judge Hogan was asked to reconsider his June, 1998 opinion. As made clear by Dr. Audain's Cert. Petition (p. 12) Judge Hogan refused to do so. This Court is being asked whether Judge Hogan invoked a discrimination standard in 1998 that was overruled in *Reeves*. It is clear that he did. That the Circuit Court refused to note this does little to alter that reality.

Finally, the University argues that Dr. Audain's case is not cert-worthy because it merely involves a fact-based analysis of the application of the rule of law to Dr. Audain's case. Perhaps Dr. Audain's Cert. Petition was unclear. It bears repeating. *Reeves* is a powerful and unanimous case announced by this Court that a) overrules a standard requiring proof of actual discrimination b) announces a standard that a showing of

pretext is sufficient in discrimination cases, c) affirms a standard requiring that a discrimination plaintiff be given the right of discovery and d) affirms the standards for Rules 50 and 56.

The explicit or implicit standards announced by the District Court in this case violate the four standards just announced or affirmed by this Court in *Reeves*. a) As made clear by footnote 7 of Dr. Audain's Cert Petition, the District Court literally announced and applied a standard that required proof of actual discrimination in discrimination cases. Contrary to the University's contention, not only was *Reeves* "reached" by the District Court, it was explicitly violated because this Court overruled a standard of actual discrimination. b) In invoking a standard of actual discrimination, and in the face of a showing of remarkable pretext (complete with racist remarks by University officials) the District Court announced a de facto standard that says that pretext is *not* enough. c) In significantly abrogating Dr. Audain's right to discovery on the very essence of his discrimination claim and then holding that he had adduced insufficient evidence to support his claim, the District Court announced a de facto standard that states that discrimination plaintiffs may have their rights of discovery abrogated to the point of significant detriment of their discrimination claims. d) The District Court implicitly announced standards that state that judicial silence toward the contract claims of a summary judgment nonmovant and looking at the facts in the light most favorable to the movant in matriculation discrimination cases are appropriate grounds for granting summary judgment. These were the explicit or implicit standards invoked in this case. They violate *Reeves*.

II. THE UNIVERSITY CANNOT SUCCESSFULLY DISTINGUISH THE STANDARD OF REEVES AS CONSTRUED BY THE CASES OF *Blow* AND *Chuang*.

In a vain effort to escape the powerful logic of the case of *Blow v. City of San Antonio* 296 F.3d 293 (5th Cir. 2001), the

University proceeds to mischaracterize the argument that Dr. Audain makes in his Cert. Petition. Nowhere in his petition does Dr. Audain argue that *Blow* asserts that simply establishing a prima facie case automatically creates an issue of material fact. *Blow* answers a remarkably self-evident question: how can one possibly argue that there is no issue of material fact in a case if the judge and the very defendant who seeks summary judgment, disagree on material facts? Those cases will be rare but when they do arise, it is completely consistent with *Reeves* to hold that summary judgment should be denied. As pointed out by Dr. Audain in his Petition, this case is such a case. Employers will not always fire employees because they are no longer qualified to hold their positions. Yet this is precisely what the University argued here: that Dr. Audain was fired because he ceased to be qualified to be an associate professor of law. An issue of material fact was automatically created for the jury when Judge Hogan found that Dr. Audain made out a prima facie case of discrimination and that he was indeed qualified. This is the message of *Blow*. It follows clearly from *Reeves*.

The University saves the discussion of the case of *Chuang v. University of California Davis* 223 F.3d 115 (9th Cir. 2000) for last, as well it should. It is very difficult to imagine a case that is more factually apposite. The venom that must lurk behind the combined events of uttering racist epiteths and physically evicting an employee from their work space, leaves one, well, breathless. The Ninth Circuit had no difficulty in finding that such a combination of events demonstrated a showing of pretext. In attempting to distinguish that case from the present one, the University does two things. First, it conveniently ignores the fact that the very person responsible for evaluating Dr. Audain was guilty of making references to "uppity nigger" in his classroom with the subsequent disenrollment of an African-American student. Second, the University appears to argue that Dr. Audain's physical eviction from his office was somehow justified. Apparently, Dr. Audain's three Masters and three doctoral degrees, as well as the

District Court's finding that he held his position "with distinction" (Cert. Pet. at 3) imply a lack of qualifications sufficient to justify physical eviction from his office. Footnote 8 of the Opposition makes no reference to the record for its assertions because those assertions are invalid. Dr. Audain respectfully requests that the Court ignore them.

III. THE UNIVERSITY MAY HAVE WAIVED ITS OBJECTION TO DR. AUDAIN'S CLAIM THAT HE WAS PREVENTED FROM CONDUCTING DISCOVERY BY FAILING TO OBJECT TO THE APPLICATION OF THE DOCTRINE OF SPOLIATION TO THE CASE AT BAR.

Rule 15, paragraph 2 of the Rules of this Court require that a party object to a "question presented" in its Brief in Opposition and failing to do so, that objection "may be deemed waived unless called to the Court's attention in the brief in opposition." In his Cert. Petition (p. 19) Dr. Audain invoked the doctrine of Spoliation of Evidence in asserting that destruction of material evidence by the University's agents implies that summary judgment should be reversed in this matter. In its Opposition, the University does not appear to object to the applicability of the doctrine for all that it has to say is that the applicability of the doctrine was never raised below. (Opposition, p. 10) The *applicability* of the doctrine therefore stands undisturbed as asserted by Dr. Audain in his Cert. Petition. For, as made clear by this Court, there is no rule that prohibits him from invoking the doctrine for the first time on appeal before this Court. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any

doubt... or where 'injustice might otherwise result.'" *Singleton v. Wulf* 428 U.S. 106, 121 (1976, citing *Hormel v. Helvering* 312 U.S. 552, 557 (1941)).

In subsequent cases, applying this "case by case" standard, this Court has made clear that it will disallow objections on appeal that were not raised below *at trial*. See e.g., *United States v. Gagnon* 470 U.S. 522, 529 (1985). It follows from all of this that the doctrine of Spoliation of Evidence is properly before the Court. First, there has been no trial in this case. Second, the injustice that would result in allowing the University to prevail on summary judgment under these circumstances is nothing short of palpable. One can only presume that the evidence destroyed by the University's agents must have been very significant to this case to warrant the risk of criminal prosecution by its destruction. Moreover, as made clear by the Cert. Petition (footnote 6), the University actually succeeded in invoking the legal process to forestall an investigation into the destruction of the evidence until the matter became moot by a grant of summary judgment in its favor. Such behavior should not be rewarded.

Parenthetically, the University finds it "absurd" to "argue" that *Reeves* has anything to do with the standard governing discovery (Opposition at p. 10). This is tantamount to objecting to the fact that snow is cold. This is because Dr. Audain did not *argue* that *Reeves* affirms plaintiff's right of discovery, he simply cited the plain language of the *Reeves* opinion to that effect (p. 17 of Cert. Petition). The University's objection in this regard is without merit. Indeed, the University makes much in its Opposition of the argument that Dr. Audain failed to adduce evidence that the reasons offered by the University were pretextual. In his Cert. Petition, Dr. Audain argued that assuming *arguendo* that this is true, then it is true because the University prevented Dr. Audain from conducting discovery of critical evidence that would have shown the University's pretext. In sum, the University's agents probably destroyed the most critical evidence in this case and the University successfully barred discovery of the remaining

critical evidence. It is this University that now comes before this Court to argue that summary judgment should be upheld against Dr. Audain because he has failed to adduce sufficient evidence to support his claim. Unfortunately, such an argument makes a mockery of the jurisprudence of this Court.

IV. THE COURT SHOULD RELY ON DR. AUDAIN'S STATEMENT OF FACTS BECAUSE THE UNIVERSITY'S STATEMENT OF FACTS CONTAINS TOO MANY MISSTATEMENTS OF FACT.

It is an unfortunate dimension of this case that on a motion for summary judgment, the University has departed very far from the objective of stating the facts that are uncontested by the parties. Not only has the University misstated the facts in this matter in its restatement of the facts, it has stated as fact allegations that are not even in the record. Indeed, the Opposition makes no reference to the record as Dr. Audain's Cert. Petition does. Instead, it makes references to tendencious documents previously filed by the University and accepted by the lower courts.

Because these misstatements of fact are legion, only a few examples will be offered here. First, for seven long years, the University has asserted in its documents that Dr. Audain was offerred the opportunity to resign from medical school or be fired. It repeats this assertion again in its Opposition (p. 4). There was no such offer. The record as cited by Dr. Audain, is remarkably clear. The contemporaneous notes taken at the faculty meeting state: "Move to not reappoint, conditional on his ability to resign from Law School. If he resigns, we nullify the nonreappoint vote." App. at 790. Second, the University repeats its often repeated contention that a "written complaint" of sexual harassment was filed against Dr. Audain (Opposition, p. 4). But, as Dr. Audain has made clear (Cert. Pet. p. 4), the sexual harassment adjudication process provides for the filing of

such a formal complaint and it is undisputed that one was never filed against him.

Third, the University continues to state as fact that Dr. Audain had only published one article the two years after his promotion as an associate professor of law in 1991(Opposition, p.3). This proposition is not only untrue but simply cannot be found in the pages cited by the University in its Opposition. Dr. Audain published a law review article in 1992 and another in 1993. App. at 146. Moreover, in its Opposition, the University does not address as it cannot, how a professor with declining scholarly productivity would have more publications than tenured full professors, have 16 manuscripts in process and be recognized by another university as an "outstanding minority scholar." Cert Pet. p. 9. The University's Opposition also fails to explain how a professor with a "decline in... performance" (Opposition p. 3) would garner the highest teaching award at the institution. (Cert. Pet. p. 9).

True, what is at stake in this case is the rule of law and Dr. Audain has no intention of trying to convert this Honorable Court into a jury. However, it would seem that there are some things that a lawyer should never leave unaddressed. Most would agree that a misstatement of facts and the statement of facts that are not even in the record, particularly on summary judgment, is high on the list of such things. Dr. Audain therefore respectfully requests that the Court rely on his statement of facts with their references to the record for an accurate statement of the facts in this case.

CONCLUSION

Who will police the police? Judges and law professors rank high on the list of those who are entrusted to protect the integrity of our legal system. The prospect of law professors knowingly and furtively going about destroying evidence in a litigation is admittedly a very disturbing prospect. However, it is not a prospect that can be adequately addressed through summary dispositions, ignored facts and unpublished legal opinions. As an officer of the court and at great personal cost to himself, for the past seven years Dr. Audain has refused to "go gently into that good night." He now respectfully requests that this Honorable Court do substantial justice in this case by reversing the lower courts and reopening discovery in this matter.

Respectfully submitted,
H. Vincent McKnight, Jr. Esq.
2000 L Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for Petitioner &
Counsel of Record